THE CENTRAL LAW JOURNAL.

SEYMOUR D. THOMPSON, Editor. } ST. LOUIS, FRIDAY, AUGUST 11, 1876. { Hon. JOHN F. DILLON Contributing Editor.

Current Topics.

PETITION IN BANKRUPTCY AGAINST CORPORATIONS.—We publish this week a very learned and elaborate opinion of Judge Sawyer of the United States Circuit Court in which he holds that since the passage of the amendatory and supplemental bankrupt act of June 1874, the same proportion of creditors must join in a petition seeking an adjudication in bankruptcy against a corporation as is required in the case of natural persons. This decision reverses the judgment of the district judge reported 13 N. B. Reg. 200, and follows the doctrine as laid down by Judges Dillon and Foster *in re* Leavenworth Savings Bank. 3 CENT. LAW JOURNAL, 207.

PAROL PARTITION OF LANDS.—The Supreme Court of Illinois, in Shepard v. Rinks, to appear in 78 Ill. 188, has held that a parol partition of lands between tenants in common, carried into effect by possession, taken by each party of his respective share according to the partition, will be valid and binding on the parties. It is laid down in the books that no parol partition can be effectual unless accompanied by deeds from one co-tenant to the other, inasmuch as the Statute of Frauds applies to such cases. 1 Wash. Real Prop. 430; see also Porter v. Hill, 9 Mass. 34; Porter v. Perkins, 5 Ib. 232; Snively v. Luce, 1 Watts, 69; Gratz v. Gratz, 4 Rawle, 411; Gardner Manu'f'g Co. v. Heald, 5 Me. 384; Dow. v. Jewell, 18 N. H. 354. "But" says Mr. Washburn "although a parol partition between tenants in common may not, for the reasons stated, affect the legal title of the several owners, where it is followed by a possession in conformity with such partition, it will so far bind the possession as to give to each co-tenant the rights and incidents of an exclusive possession of his property;" and it is further said, that exclusive possession by one tenant in common of a particular part of the estate, accompanied by a denial of his co-tenant's right of possession in the part thus occupied, may grow into a legal presumption of partition having been made. But the doctrine enunciated in the Illinois case is not new in that state. See Tomlin v. Hilyard, 43 Ill. 300; Vasey v. Board of Trustees, 59 Ill. 188; Grimes v. Butts, 65 Ill. 347; and it has been followed in several other states. Jackson v. Hardee, 4 Johns. 202; Wood v. Fleet, 36 N. Y. 499; Eaton v. Tallmadge, 24 Wis. 217; Moore v. Kerr, 46 Ind. 468; Torry v. Cook, 116 Mass. 163.

RIGHTS OF RAILWAY PASSENGERS.—The question as to what rights a passenger on a railway train is presumed to have, and how far he will be justified in maintaining them, seems to be in rather an unsettled condition. Some courts hold practically that he has no rights at all, but that from the time he enters the train, he is entirely at the mercy of the servants of the corporation. That it should become a settled rule of law that a passenger on a train must submit to all the rules of a company and the commands of its subordinates, whether reasonable or unreasonable, without resistance or indemnification, would be a grievance indeed, to a very large class of citizens who require to make frequent use of this kind of conveyance. In one of the courts of Ohio the other day, in the case of Shelton v. L. S. & M. C. R. R., 1 Cinn. Law Bulletin, 190, the conductor of a train having wrongfully taken up a commutation ticket belonging to the plaintiff, before the number of rides evidenced by it had been obtained, the plaintiff refused to pay his fare twice, and the conductor having ejected him from the car, be brought suit against the company. The court instructed the jury, that the wrongful act of the company by its agent, in taking up the plaintiff's ticket, did not entitle him to refuse to pay his fare or produce his ticket on the same day when called on for it, and if he did so, the defendant had the right to cause him to be removed from the train. The court founded its extraordinary charge on the case of Townsend v. The N. Y. C. & H. R. R. R., 56 N. Y. 295, where it was held that no one has a right to resort to force to compel the performance of a contract made with him by another. It is satisfactory to find that the rule in this case has lately been very much modified in English v. Delaware & Hudson Canal Company, 4 Hun, 683. Here the plaintiff had once paid his fare, and when it was again demanded, refused to pay, and resisted an attempt to eject him from the cars, and for the damage done brought action against the company. The court held that when a conductor of a railway train wrongfully attempts to remove a passenger from a train, such passenger has a right to protect himself against the attempt, and resistence can lawfully be made to such an extent as may be essential to maintaining such a right, and resisting the wrongful expulsion. The court also held that the doctrine in Townsend v. N. Y. C. & H. R. R. R., is not applicable to a case where the conductor is in the wrong in his action. The Ohio case was in every respect similar to this, the passenger refusing to pay his fare twice. We regret that the court in instructing the jury, instead of only recollecting the old New York case, which could be made to shield the company, had not considered the late case in that state which we have alluded to, which would, if followed, have protected the passenger.

THE BELKNAP IMPEACHMENT CASE.—The final vote of the senate, on the first instant, acquitting the late secretary of war of high crimes and misdemeanors, was not in reality an acquittal upon the merits of the case. It will be remembered that when the *expose* of Belknap's bribery was made, he hastened to the President and tendered his resignation, which was promptly accepted. The object of this, no doubt, was to escape impeachment before the senate. When the house of representatives preferred articles of impeachment against him before the former body, he filed a plea denying the jurisdiction, on the ground that a person is not subject to impeachment, after he has ceased to be an officer of the United States. In other words, his position was that the proceeding by impeachment has for its object simply the removal and disqualification of a public officer guilty of high crimes and misdemeanors, but that after he has ceased to be an officer, he can only be punished for crimes committed while in office, by indictment or information in the ordinary courts of criminal jurisdiction. This plea to the jurisdiction was overruled by a majority of the senators, but not by a *two-thirds* majority, and thereupon, by a majority of less than two-thirds, the senate took order to proceed to the trial on the merits. But the question was raised, and on the final argument was discussed at great length: Can a jurisdictional question be decided against the accused in a proceeding before the senate of the United States, by impeachment, by a majority of less than two-thirds. Twenty-six senators were of opinion that it could not, and twenty-five of them asserted this opinion on the final vote by voting not guilty, each one of them explaining that he so voted because he was of the opinion that the senate was without jurisdiction.

The result can not be regarded as satisfactory. As to the merits, the evidence made out a clear case of bribery. As to the great question of law involved, whether a person is

amenable to impeachment after he has ceased to be a public officer, it remains where it was before—unsettled. The vote is entitled to still less respect, from the fact that the senators appear to have made it a party, instead of a judicial, question.

SALE OF COTTON TO CONFEDERATE STATES.—In the case of Whitfield v. The United States, decided at the last term of the United States Supreme Court, the plaintiff, a resident of the state of Alabama, being the owner of 177 bales of cotton, sold it to the confederate states government, he accepting as payment bonds of that government. The cotton was never removed, but remained in the possession of Whitfield until September 1, 1865, when it was seized by the agents of the United States, and sold in New York, the proceeds being paid into the treasury. This suit was bought to recover these proceeds. The Supreme Court held that the title passed to the confederate states when the bonds were delivered and that he could not recover in the courts of the United States, the purchase-money due from the confederacy on the principle, that a sale or credit implies a guarantee of the solvency of the purchaser until the payment is made. In U. S. v. Huckabee, 16 Wall. 414, it was held that real property purchased by and conveyed to the confederate states during the war passed to the United States at the restoration of peace, by capture, and the title of the United States thus acquired was sustained against a claim made by the vendors of the confederate states, that the conveyance was obtained from them by duress. The same principle was recognized and acted upon in U. S. v. Titus, 21 Wall. 475. It is thus decided that the confederate states government could acquire title to real property by purchase, and it is not easy to see why a different rule should be applied to personal property. The ownership of that, even more than real property, was required for the operations of the confederacy. Contracts of sale, made in aid of the rebellion, will not be enforced by the courts, but completed sales occupy a different position. As a general rule, the law leaves the parties to illegal contracts where it finds them, and affords relief to neither. A sale of personal property, when completed, transfers to the purchaser the title of the property sold. Whitfield's sale in this case was not on credit, but for bonds which passed from hand to hand as money. The transaction in this respect was not different from a sale to the United States for any of their public securities payable at a future day. The sale was complete when the bonds were accepted in payment. The title then passed to the confederate states, without a formal delivery. From that time Whitfield ceased to be the owner of the cotton. The claim that he had the right to retain the possession of the cotton until the purchase-money was paid, because of the insolvency of the confederate government, is not applicable to the facts established by the evidence, as the purchase-money had been paid before the insolvency. But if this were otherwise, it is not easy to see how his claim, growing out of his illegal contract as it does, can be enforced against the United States in the court of claims. In Sprott v. U. S., 20 Wall. 463, it was decided that one owing allegiance to the government of the United States could not avail himself of the courts of the country to enforce a claim under a contract by which, for the sake of gain, he knowingly contributed to the "vital necessities of the rebellion." For that reason, the court refused to give effect to a purchase of cotton from the confederate government. This case is not distinguishable from that in principle. Cotton was, during the late war, as much hostile property as the military supplies and munitions of war it was used to obtain. When Whitfield, therefore, sold his cotton to the confederacy and took their bonds in payment, he contributed directly to the means of prosecuting the rebellion. He stated in his petition, that his sale was not made to aid the rebellion, but the purchase was clearly for that purpose, and no other. This he could not but have known. Under such circumstances "he must be taken to intend the consequences of his voluntary act." Hanauer v. Doane, 12 Wall. 347. By his sale, he knowingly devoted his cotton to the war, and his rights must follow its fortunes. The courts of the country would not relieve him against one who held title by conveyance from the confederate states and under that title had obtained possession. Neither would they interfere, in behalf of a purchaser from the confederate states, to enforce possession under his sale. But when his possession has been lost by reason of his sale, no matter how, the courts will afford him no relief against the loss. Having, by his acts, entered the lists against his rightful government, he can not, if he loses, ask it for protection against what he has voluntarily done. In this case, he seeks to enforce a right growing out of his contract of sale, which was tainted with the vice of the rebellion. It was a contract which could not have been enforced against him, and he is equally powerless under its provisions against others. He seeks, in effect, by this action to recover, in the courts of the United States, the purchase-money due from the confederate states, upon the principle that a sale upon credit implies a guaranty of the solvency of the purchaser until the payment is made. Such is not his position; but if it were, having lost his possession, he has no standing in court for relief. He is not the owner of the property, and his lien is not one the courts of the United States will enforce.

Some Thoughts on Constitutional Reform.

On the 4th of July, Judge Dillon delivered an oration at Davenport, in which he took occasion to express his views on several questions of constitutional reform. When the federal constitution was framed and adopted, if the confederacy theretofore existing had consisted of a body of states, closely knit together by means of a vast network of railroads and telegraphs, abolishing to a great extent time and distance, it is reasonable to suppose that the framers of it would have distinctly delegated to Congress the power to control these great agencies, and that they would have lodged a corresponding jurisdiction in the judiciary. There are certainly as strong reasons for remitting to the national courts jurisdiction over questions incidental to railroads and telegraphs, as over questions incidental to a coastwise and river marine. All, are in an equal degree, agencies of inter-communication between the states. But it is believed by many who have given careful thought to the subject, that Congress has been vested with ample power in this regard, and that this power ought to be exercised so as to make the laws relating to these great agencies equal and uniform throughout the Union. On this question, the views of a jurist of recognized ability, who is not and never has been a candidate for a political office, and who has given to the subject much impartial reflection, are certainly worthy of attention. Judge Dillon said: "During the last quarter of a century, corporations of all kinds have multiplied beyond what the most far-sighted could have deemed possible. Chief Justice Marshall little dreamed of it fifty years ago, when the Dartmouth College judgment was pronounced. With few exceptions, these corporations have been created by the individual states—including railway corporations. In this country we have already about 70,000 miles of completed railway. Railways have become the great avenues of travel, transportation, and inland commerce. Over the highways of travel, and over the avenues and instrumentalities of the commerce of a nation, the power of governmental control rightly extends. Here we have a vast continent of 4,000,000 square miles, and our railroad system is made up of links furnished under the authority of the several states. The tendency

of these corporations to consolidate exists in the nature and purposes of their organization, and the process of consolidation is constantly going on. We have in this country single men whose unchecked wills control a hundred millions of dollars of mobilized capital invested in a single railway enterprise or system. What vast power is here! What is more imperative than to protect this capital in all its just rights, unless it be the duty equally, but not more sacred, of seeing that the holders of these great powers and franchises shall not exercise them oppressively. Confessedly, the subject in its most important relations is beyond the reach of the several states, and to my mind, unless we shall leave these corporations without adequate protection on the one hand, and the duty of just and full obedience and submission to law on the other, they must come in the future, except as to matters purely internal to the states, under the dominion of the general government. And the power of the constitution over commerce, heretofore dormant in this regard, must be brought into activity whenever needed, to the extent necessary to meet the expanding wants and changing exigencies of the public welfare."

Another question of perhaps still deeper moment is now pressing itself upon the public attention, and, though it has been made an issue in the pending presidental canvass, and by a resolution relating to it has been incorporated into a platform of one of the great political parties,—yet, we do not wish to speak of it from a party standpoint. We refer to the principle of universal education. A hundred years of experiment have convinced us to our satisfaction and to our cost, that republican institutions can not succeed except when supported by an intelligent voting population. In some of our large cities, and in some of the states of the Union, where the voting majorities are ignorant, and hence antagonistic and incompatible with our scheme of government, corruption and lawlessness have run rife to such an extent as to defeat the ends of government, and make a despotism almost preferable. Grave as is the doubt whether popular education alone will afford a complete remedy for these evils, the fact remains that it is the only apparent remedy within reach. It is our deliberate conviction that the same consideration which moved the framers of the constitution to guarantee therein to every state in the Union a government republican in form, should now urge the adoption of an amendment guaranteeing to every state an intelligent voting population, by requiring Congress to provide ample means of popular education in those states where it has not been done by the local authorities, and by making education compulsory, and thus vouchsafe the perpetuity of the government. Ignorance is corruption; corruption is anarchy; and anarchy is despotism. We are exceedingly glad to find so careful and fair-minded a man as Judge Dillon giving utterance to pronounced views on this subject. In the address referred to, he observed: "Profoundly believing that *universal education* is the only permanent security for *universal freedom*, and that it is absolutely essential to the maintenance and successful working of a government based upon the universal will, for myself let me avow and declare that I regret that the subject of public education, at least to the extent of superintendency and guaranty, is not to be found among the constitutional powers of the general government. There it belongs, for it is not merely or chiefly a matter of state concern whether masses of the people shall grow up in ignorance, but one which concerns the nation at large, for they vote not only for local officers, but for representatives in Congress and for President."

A question of scarcely less importance is the necessity of a stable and independent judiciary. In the maelstrom of corruption that, succeeding a great war, has engulfed so many persons holding political and private trusts, it is matter for congratulation that the judiciary has, for the most part, remained above suspicion. It has been indeed a narrow and perilous escape: for if the people had come to believe that justice could only be had by buying and selling, they would have despaired of the republic, and would have been ready to welcome any change. Nevertheless the system of electing judges by the popular vote, thereby making the tenure of the office depend upon the whims and accidents which prevail in a mob of politicians called a nominating convention, and, what is still worse, the system of confining the tenure of office to a short term, has greatly lowered the *morale* and impaired the independence of the state judiciary in most of the states of the Union. In New York state, the elective judiciary system has wrought many and most disasterous results--tending to a subversion of the municipal government. In this state, we are about to endure the spectacle of seeing the ablest judge who has sat on the supreme bench for many years, turned out of office in the maturity of his learning, and in the fullness of his powers, to make room for a man whose past services give no earnest of his fitness for the position. That the judges should be appointed and not elected, and that they should hold their offices during good behavior, are propositions which very few lawyers, who are familiar with the evils, who are not engaged in politics, will controvert. In giving Judge Dillon's remarks upon this subject, we are, therefore, but adding the weight of his testimony to the much that has already been said on a most important and fruitful theme: "In one matter of supreme importance, the people of most of the states have departed from the system which was approved and adopted by the founders of our government—I mean in substituting an elective judiciary, with short terms, in the place of an appointed judiciary with a permanent tenure—that is, during good behavior. Reflecting men know that this is a very disastrous mistake, and candid men will admit it. In all our constitutions, executive, legislative and judicial, powers are carefully discriminated and separated. We have the high authority of Mr. Webster that 'liberty is only to be preserved by maintaining the great divisions of political power.' Legislative and judicial powers are entirely dissimilar. As respects the exercise of the one, majorities—the popular voice—may well govern. As respects the exercise of judicial power, popular opinion has no place, and it is an invasion of the rights of justice if it ever enters the jury box, or is regarded by the judge. A stable and independent judiciary is the strongest hope of the country—judges who are independent of the people, of the legislature, of the executive, or of party favor. That was the system our fathers gave us, and that is the system that, forgetting the nature of judicial power, we have most unfortunately discarded in so many of the states of this country. The best interests of the country are concerned in retrieving that mistake. The mode of selection is not so important, perhaps, as the tenure and compensation; one should be during good behavior and the other adequate and beyond legislative diminution."

Writers on the principles of republican government, since Alexander Hamilton's day, have avowed and strenuously maintained the doctrine enunciated by Judge Dillon—the only true and safe principle in a government like our own. The fundamental doctrine and theory upon, and underlying which, our structural union exists, is, that virtue dwells with and in the hearts of the people—in the judiciary. And it must be conceded that a virtuous and high-minded judiciary is the supreme bulwark of our safety at home and honor abroad. Men should seek, neither for themselves nor the public, power, but virtue. We sincerely trust that the principles of constitutional reform enunciated by Judge Dillon may continue to be generally discussed and agitated until such evils in our everal state governments be remedied.

Fraudulent Assignment- Relative Rights of Creditors of Grantor and Grantee.

PARKER v. FREEMAN *ET AL.*

Chancery Court at Nashville, Tennessee, April Term, 1876.

Before Hon. W. F. COOPER, Chancellor.

The creditors of a fraudulent grantor have no equity as against the innocent creditors of the fraudulent grantee, which entitles them to priority of satisfaction out of personal property fraudulently conveyed, where such creditors of the grantee have obtained the first lien. *Qui prior est in tempore potior est in jue.*

COOPER, C.—Bill filed April 12, 1875, and states the following facts: About May, 1874, the defendant, John J. Parker, became indebted to his brother, the complainant, for the board of himself and family for four months, and for a small sum of money loaned. In 1873 the said John J. Parker, for the purpose of hindering and delaying his creditors, made a pretended sale of all his household and kitchen furniture to the defendant, E. J. Frisbie, "and executed a bill of sale therefor," which was acknowledged and registered. The pretended consideration was an indebtedness of John J. Parker to Frisbie of $540, which was about the value of the property, whereas said Parker did not owe Frisbie anything, or if anything, only a small sum long since paid. In February, 1875, Frisbie set up a saloon and restaurant in Nashville, the defendants, Freeman and Orchard, furnishing the goods for the same. On the 9th of April, 1875, the defendant, Freeman, sued out an attachment upon this debt against the estate of Frisbie, upon the ground that Frisbie was about fraudulently to dispose of his property, and the attachment was levied on the furniture conveyed by Parker to Frisbie. Frisbie afterwards confessed judgment for the debt sued on, and the officer was proceeding to sell the property attached to satisfy the judgment, when he was stayed by the injunction in this case. The bill charges "that said proceedings before the magistrate were gotten up by collusion between the said Frisbie and Freeman, and he (complainant) is advised that the same is void." There is a further charge that Freeman and Orchard knew the fraudulent character of the conveyance from Parker to Frisbie.

These latter charges of collusion and knowledge are denied by the defendants, Freeman and Orchard, in their answer, and again by Freeman in his deposition. The only testimony introduced by the complainant consists of his own deposition, and he does thereby undertake to bring home knowledge of the fraud to the defendants. His evidence standing alone is insufficient to outweigh the denials of the answer, and of Freeman in his deposition. The bill concedes that the claim of the defendants, Freeman and Orchard, against Frisbie is for goods furnished, and the complainant proves his own claim. The only difference between the case made by the bill and by the answer of Freeman and Orchard, considering the charge of collusion and knowledge as not proven, consists in this, that the conveyance from John J. Parker to Frisbie was a mortgage, not a sale, and that the defendants abandoned their attachment, and were proceeding to sell the property by execution under the judgment confessed, when stayed by the injunction. These differences are immaterial. For the legal title of the furniture would be in Frisbie whether the conveyance was a sale or mortgage, and could be levied on by execution and sold, the purchaser, if it be a mortgage, taking subject to the equity of redemption. It is the equity of redemption of the mortgagor which can not be sold by execution. Wilson v. Carver, 4 Hay. 90. So, whether the lien of the defendant was acquired by attachment or execution levy could be of no consequence, there being no essential distinction between the lien of an attachment and execution. It has been expressly decided that the lien created by the levy of an attachment has the same effect, both at law and in equity, as an execution lien. Hervey v. Champion, 11 Hum. 569.

In this view, the case before us shows that the complainant, as a creditor of John J. Parker, is seeking to subject to the satisfaction of his debt, by the lien created by the filing of his bill, the furniture in question as the property of John J. Parker, while the defendants, Freeman and Orchard, as judgment-creditors of Frisbie, are seeking to subject the same furniture, as the property of Frisbie, to the satisfaction of their judgment by the prior lien created by the levy of their execution, the conveyance from Parker to Frisbie, whether sale or mortgage, having been made to hinder and delay Parker's creditors, but without knowledge of the fact by Freeman and Orchard. The question is narrowed down to this: Have the creditors of a fraudulent grantor any equity as against the innocent creditors of the fraudulent grantee which gives them a prior right of satisfaction out of the property fraudulently conveyed, where the creditors of the grantee, without knowledge of the facts, have acquired a lien by virtue of a levy of an execution before any step taken or lien obtained by the creditor of the grantor?

The law is that a fraudulent conveyance of property is good between the parties, and as to all the world except the creditors of the grantor. The grantee has a valid title, with all the usual rights incident thereto, until the creditors of the grantor, by asserting their right in due course of law, defeat it. The grantee may, consequently, in the meantime, make a disposition of the property to an innocent third person for value, and innocent third persons may, by proper legal proceedings against the grantee, acquire liens upon the property. For, were it otherwise, the policy of the law, which is to treat the *res* as the property of the grantee, would be thwarted. Accordingly it has been held by our supreme court that the law only authorizes the creditor of the grantor to proceed against the property in the hands of the fraudulent vendee; and, therefore, if the property has been destroyed by time or accident, or is sold and delivered to an innocent person for a valuable consideration, the creditor's remedy is gone. Simpson v. Simpson, 7 Hum. 275; Tubb v. Williams, 7 Hum. 367; Richards v. Ewing, 11 Hum. 327. And an innocent person's rights, as assignee of a fraudulent mortgage, are superior to those of a prior judgment-creditor of the mortgagor. Danbury v. Robinson, 1 McCarter, 213. So, also, it has been held that a sale under execution against the grantee will pass a good title as against the debtor. Robinson v. Monjoy, 2 Halst. 173. And after an actual seizure by the creditors of the grantee, the property can not be reclaimed by an officer acting under an execution against the grantor. Gibbs v. Chase, 10 Mass. 125. So (*e converso*) a seizure by creditors of the grantor excludes the creditors of the grantee. Booth v. Bunce, 24 N. Y. 592. The principle of these decisions is, that the creditors of the grantor and grantee have no priority of rights, and no equity as against each other; that they stand upon the same level, and it becomes a race of diligence between them. *Qui prior est in tempore potior est in jure.*

In this view, the prior levy of the execution of the defendants, Freeman and Orchard, on the furniture, as the property of Frisbie, gave them a lien of which equity will not deprive them at the suit of the complainant as a creditor of the grantor, whose right can only date from the subsequent filing of the bill. The bill must, therefore, be dismissed with costs.

Presumption—Lease.

STOTT *ET AL.* v. RUTHERFORD.

Supreme Court of the United States, October Term, 1875.

Where the recital in a lease as to the character in which the lessors acted is not inconsistent with their holding the legal title in trust, if such be necessary to its validity the presumption will be in favor of the validity of the instrument. The rule of law that a lessee, is estopped from disputing the title of his lessor, followed.

In error to the Supreme Court of the District of Columbia.

Mr. Justice SWAYNE delivered the opinion of the court.

This is an action of covenant brought upon an indenture of lease executed by the plaintiffs in error and one P. D. Gurley, since deceased, to the defendant in error. The declaration sets out sundry breaches of stipulations contained in the lease. The defendant pleaded *non est factum* and satisfaction of the claim of the plaintiffs by payment. Upon the trial several bills of exception were taken by the defendant. They show that he made numerous points, all of which were overruled by the court. But one of them requires any consideration. He objected to the admission of the lease in evidence, upon the ground that it showed upon its face that the lessors had no title to the premises and that the instrument was, therefore, a nullity. The court admitted the evidence, and an exception was regularly taken.

A verdict was rendered for the plaintiffs. The defendant moved for a new trial, and the case was heard by the full court in general term. That court ordered a judgment to be entered for the defendant, *veredicto non obstante.* The plaintiffs have brought the case before this court for review. The judgment of the court below proceeded solely upon the ground of the invalidity of the lease, and that subject is the only one argued here.

The lease created a term beginning on the 1st day of February, 1864, and to continue five years. It recites that the lessors, in making the lease, "were acting as a church extension committee, by authority and on behalf of the general assembly of the Presbyterian Church, old school." The leasehold premises are described as "being lot number four and part of lot number five." etc., "as now held by the parties of the first part," etc. The lessee covenants, among other things, "that he will well and truly surrender and deliver up the possession of said premises to the said parties of the first part, their successors and assigns, in accordance with the stipulations herein contained, whenever this lease shall terminate." It was provided that the lessors might terminate the lease for non-payment of rent, or otherwise, at their option, by giving the requisite notice. The language of the grant was, "have granted, demised, and to farm let." The words "grant" and "demise" in a lease for years create an implied warranty of title and a covenant for quiet enjoyment. Burney v. Keith, 4 Wend. 502; Grannis v. Clark, 8 Cow. 36; Young v. Hargrave's Adm. 7 Ohio Rep. part 2, 68.

The declaration avers "that by virtue of which said indenture the said defendant immediately thereupon entered into the occupancy and enjoyment of said premises and appurtenances, and was possessed thereof until about the first day of October, 1869, when he vacated such possession and occupancy, and the term of said lease was determined." This is not denied by the defendant's pleas, and is, therefore, according to a settled rule of the law of pleading, to be taken as admitted. The lessors executed the lease in their own names, and not as agents. They demised the premises in the same way. The rent was stipulated to be paid to them in their own right. The covenants of the lessee were all to them personally. If there had been a breach of the covenants of title and for quiet enjoyment, they would have been personally liable for the damages. The lessee entered into possession and remained in possession, enjoying that possession as long as he chose to do so. He had on his part the full benefit of the contract. When called upon to pay and perform as he had covenanted to do, he answered that the lessors had no title, and that he was in nowise responsible to them.

In Laws v. Purser 6 Ellis & Bl. 932, the plaintiff, a patentee, had licensed the defendant to manufacture the article covered by the patent. After having done so, he refused to pay the royalty. The patentee sued him. He pleaded "that the letters-patent were void, and that he had a right to make and sell the article without the plaintiff's permission," The plaintiff demurred. The court said: "It would be monstrous if the defendant, after such an agreement acted upon, could on this ground refuse payment." The demurrer was sustained.

There are two answers to the defence relied upon in this case.

The recital in the lease as to the character in which the lessors acted, and all that is said upon the subject in the bill of exceptions, are not inconsistent with their holding the legal title in trust to enable them the better to discharge the duties touching the property with which they were clothed. Every reasonable presumption is to be made in favor of the validity of the instrument which they executed. The act done presupposes the prior act necessary to give it validity. It is not stated in the bill of exceptions that the lessors had no paper title, but "that they possessed no estate whatever in said lands except such as pertained to the office of such committee, and have no estate therein in their individual capacity." The legal title in trust would be just such an estate as is here exceptionally and negatively indicated. We are all of the opinion that it is a fair inference from this language that the lessors had such an estate, or some other title in trust, sufficient to warrant their giving the lease and to render it valid.

We think the principle that the lessee can not dispute the title of his lessor also applies. We see nothing to take the case out of this long settled and salutary rule—Williams v. Mayor etc., 6 H. & J. 529; Stewart v. Roderick, 4 Watts & S. 189; Coburn v. Palmer, 8 Cushing, 627. The rule applies with peculiar force where the lessor was in possession and transferred that possession upon his faith in the validity of the lease to the lessee. Taylor's Landlord and Tenant, sec. 707.

Whether the testimony set forth in the bill of exceptions, as to the title of the plaintiffs in error, was competent, is a question not raised before us and upon which we therefore express no opinion.

According to the views upon which the judgment below was given, the lessee could not only refuse performance of all his covernants, but, at the end of the term, he could have held possession in defiance of his lessors, and he could have continued to hold possession until they showed a valid title in a suit brought to enforce it, or until such a title in such a suit was shown by some other party. This, we think, would be contrary alike to reason, justice and the law.

The judgment of the Supreme Court of the District of Columbia is reversed, and the case will be remanded to that court, with directions to enter a judgment upon the verdict in favor of the plaintiffs in error.

When Decisions of the Supreme Court of a State will be Followed.

TOWN OF ELMWOOD v. MARCY.

Supreme Court of the United States, October Term, 1875.

The Supreme Court of the United States has always followed the highest court of the state in its construction of its own constitution and laws, where the construction has been fixed by an unbroken series of decisions. But where they have been construed differently at different times, the court adopts the first decision and rejects the last.

In error to the Circuit Court of the United States for the Northern District of Illinois.

Mr. Justice DAVIS delivered the opinion of the court.

The judges of the circuit court were divided in opinion whether under the facts of this case and the legislation of Illinois applicable to them, there existed power and lawful authority to issue the bonds and coupons in controversy, so as to render them valid and collectible, in the hands of the plaintiff below, who is defendant here. Judgment was rendered in his favor, and the cause is brought here for review. From the certificate of division it appears that the Dixon, Peoria and Hannibal Railroad Company was incorporated March 5th, 1867; that prior to February 11th, 1869, the road of said company was located in said township of Elmwood; that at the date last named, an election was called under the provisions of the charter of said company, to be held March 16th, 1869, to determine whether said township would subscribe to the stock of said company, and give its bonds for $35.000, the maximum amount permitted by law; that five days afterwards, to wit, on the 16th of February, 1869, notice was given of another election, not purporting to be in pursuance of said charter, to be held at the same time and place with that aforesaid, to determine whether said township would subscribe to the stock of said company, and issue the bonds for a further sum, over and above the amount authorized by law as aforesaid; that said first named election resulted in favor of subscribing said $35,000, and the second named election resulted in favor of an additional subscription of $40,000; that after both said elections were notified, and seven days before they were held, viz: on the 9th of March, 1869, the charter of said company was amended so as to authorize towns in which said road might be *thereafter* located, to vote and subscribe $100,000 to its capital stock. Also, that thirty-two days after said election, viz: on the 17th day of April, 1869, the legislature passed a validating act, and that ten days thereafter, on the 27th of that month, the supervisor and town clerk issued the bonds and coupons contemplated by both elections. It legalized and confirmed the subscription for $40,000 to the capital stock of the company over and above that for $35,000, which was confessedly legal and made in accordance with the provisions of the original charter. The bonds in suit are part of those issued for the greater sum, and the question is, whether they are binding on the town.

They have been the subject of litigation in Marshall v. Silliman, 61 Illinois 218, and Wiley v. Silliman, 62 Id. 170. The last case involved the validity of the identical bonds in question here, but both were in all substantial particulars alike, the only difference being that the act of March 9th, 1869, did not apply to the first case. They were bills in equity to enjoin the collection of taxes for the payment of interest, and the court decided that neither the law of March 9th nor the curative act of April 17th, gave any power to issue the bonds. In reaching that conclusion, the opinion affirms that when the notice for the vote was posted, the charter of the company only authorized a subscription for $35, 000, and that the notice under which the vote for $40,000 was taken was a mere call for a special town meeting, signed only by twelve voters, which did not seek to follow the provisions of the charter, as indeed, it could not do, since the power under them was already exhausted, and that it was an utterly void proceeding, and that law is disposed of in these words: "It is true that on the 9th of March, 1869, the legislature passed another act authorizing towns to subscribe $100,000, but a new notice was not given. The charter required twenty days' notice, and only seven intervened between the passage of the act and the vote."

It was insisted, however, that the curative act passed after the vote had been taken gave validity to the bonds. On this position counsel placed their chief reliance, and to it the court directed its principal attention.

The act was direct and positive and left nothing to inference. It was intended, so far as the legislature could do it, to make the bonds binding on the township, and collectible in the same manner as if the subscription had been authorized by the charter, and voted for in accordance with its terms. The court held it to be a violation of the 5th section of the ninth article of the constitution of 1848, which declares "that the corporate authorities or counties, townships, school districts, cities, towns and villages, may be vested with power to assess and collect taxes for corporate purposes, such taxes to be uniform in respect to persons and property, within the jurisdiction of the body imposing the same." The decision was placed on the ground that this section having been intended as a limitation upon the law-making power, the legislature could not grant the right of corporate taxation to any but the corporate authorities, nor coerce a municipal corporation to incur a debt by the issue of its bonds for corporate purposes. In the opinion of the court, the act was an effort to do both these things, as it attempted to confer the power of municipal taxation upon persons who were not by themselves the corporate authorities in the sense of the constitution, and to compel the town to issue its bonds for railroad stock, by declaring a said proceeding to be a valid subscription.

Counsel argued that the act might be treated as an authority to the supervisors and town clerk to issue the bonds, without a vote of the people, and cited The Town of Keithsburgh v. Frick, 34 Ind. 420, which recognizes that the legislature can constitutionally bestow upon the trustees of a town, the power, if they think proper to exercise it, to subscribe for and take stock in a railroad company, without requiring the subject to be submitted to a vote of the people. The court adhering to the doctrine of that case, but distinguishing it from the one under consideration, said, "that the town supervisor and clerk who issued the bonds in controversy do not represent a township, as the board of trustees represent an incorporated town, or the common council a city. The supervisor and town clerk are but a part of the corporation. They have no power of taxation, nor power of themselves to bind the city in any way," and cited Loovingston v. Wilder, 53 Id. 302, as authority on the subject. But even if these two officers could be recognized as the corporate authorities, the court observed, "that they can not be said to have voluntarily incurred this debt in behalf of the town. The act gave them no discretion. It declared the subscription shall be binding, and may be collected, and left to the town authorities only the ministerial function of executing the behest of the legislature."

The main doctrines of these cases were not new, but had been settled by the repeated adjudications of the supreme court, and that learned tribunal has given no decision in conflict with them.

In Howard v. The St. Clair Drainage Company, 53 Id. 130, the clause of the constitution under consideration in Marshall v. Silliman, and Wiley v. Silliman, was construed to be a limitation upon the power of the legislature to grant the right of corporate or local taxation to any other persons than the corporate or local authorities of the municipality or district to be taxed. To the same effect are Hessler v. Drainage Company, 53 Id. 110, and Lovingston v. Wilder, Id. 302. The People *ex rel.* etc. v. The Mayor of Chicago, 51 Id. 30, decides that the legislature could not compel a municipal corporation, without its consent, to issue bonds or incur a debt for a merely corporate purpose.

So far as we can see, the only new point determined in the cases we have first cited is, that it is not competent for the legislature to single out the supervisor and town clerk, and confer on them powers which the constitution limits to the corporate authorities as an aggregate body.

We are not called upon to vindicate the decisions of the Supreme Court of Illinois in these cases, nor to approve the reasoning by which it reached its conclusions; and if the questions before us had never been passed upon by it, some of my brethren who agree to this opinion might take a different view of them. But are not these decisions binding upon us in the present controversy? They adjudge that the bonds are void, because the laws which authorized their issue were in violation of a peculiar provision of the constitution of Illinois. We have always followed the highest court of the state in its construction of its own con-

stitution and laws. It is only where they have been construed differently at different times that, in cases like this we have adopted, as a rule of action, the first decision, and rejected the last. This has been done on the ground that rights acquired on the strength of the former decisions ought not to be lost by a change of opinion in the court. But where the construction has been fixed by an unbroken series of decisions, the federal courts accept and apply it in cases before them. If a different rule were observed, it is not difficult to see that great mischief would ensue.

There has been no conflict of judicial opinion in Illinois on the controlling question in this suit; but, on the contrary, settled uniformity, and as these concurring decisions of the court of last resort in that state are grounded upon the construction of its constitution and statutes, it is the duty of this court to conform to them.

The judgment is reversed and a new trial ordered.

Liability of Municipal Corporations—The District of Columbia.

BARNES v. THE DISTRICT OF COLUMBIA.

Supreme Court of the United States, October Term, 1875.

1. Case in Judgment.—Action to recover damages for a personal injury received by the plaintiff, in consequence of the defective condition of one of the streets of Washington. This action arose from the construction of the Baltimore and Pacific Railroad through the street. The road was built by permission of the corporation, and authority was given to the road to change the grade of the street according to a plan filed. In making this change, a deep excavation was made, into which the plaintiff fell. *Held*, that the corporation was liable.

2. Corporation Liable for Negligence in Construction of Work.—A municipal corporation is liable for injury to an individual, arising from negligence in the construction of a work authorized by it.

3. Functions of a Municipal Corporation.—A municipal corporation, in the exercise of all its duties, is but a department of the state. The legislature may give it all the powers that it is capable of receiving, or may strip it of every power, leaving it a corporation in name only.

4. Officers of Corporation.—A municipal corporation may act through its mayor, council, or legislative department, by whatever name called, its superintendent of streets, commissioner of highways or board of public works. It is of no consequence by what means these several officers are placed in their position, whether they are elected by the people of the municipality, or appointed by a president or governor.

5. The District of Columbia.—Under the act of Congress of February 21, 1875, entitled "An act to provide a government for the District of Columbia," the mayor and the legislative department are equally the representatives and agents of the municipal corporation created thereunder, unaffected by the circumstances that the one is appointed by the President, and the others are elected by the people, or that the one is paid from one source, and the others from another source. They are severally members and parts of a municipal corporation whose charter emanates from the Congress of the United States, and by which their power and authority are conferred or defined.

6. Board of Public Works.—The board of public works, organized under the 37th section of said act, forms a part of the municipal corporation, the District of Columbia, and the acts of that body in the repair and improvements of streets, etc., are the proceedings of the municipal corporation.

7. Fee of Streets in the United States.—That the fee of the streets is vested in the United States, and not in the municipal corporation, is not material to the case.

In error to the Supreme Court of the District of Columbia.

Mr. Justice HUNT delivered the opinion of the court.

This is an action to recover damages for a personal injury received by the plaintiff on the 14th of October, 1871, in consequence of the defective condition of one of the streets of the city of Washington. The accident occurred on K street east, and arose from the construction of the Baltimore & Potomac railroad through that street. The road was built by permission of the corporation, and authority was given to the road to change the grade of the streets according to a plan filed. In making this change, a deep pit or excavation was made, into which the plaintiff fell. The injury to the plaintiff, the defective condition of the street and the negligence of those having it in charge, are not before us. These questions were submitted to the jury, and the jury have found the issue upon each of them in favor of the plaintiff. The verdict of the jury, by which they awarded to the plaintiff the sum of three thousand five hundred dollars as damages, besides his costs, and the judgment thereon, were set aside by the general term of the district, and judgment ordered in favor of the defendant. From this judgment the present writ of error was brought

The municipal corporation, "the District of Columbia," was organized under the act of Congress of February 21st, 1871. 16 Stat. at Large, 419. The first section of the act creates a municipal corporation by the name of the District of Columbia, with power to sue, be sued, contract, have a seal and "exercise all other powers of a municipal corporation, not inconsistent with the laws and constitution of the United States, and the provisions of this act." By section second, the executive power is vested in a governor, to be appointed by the President, with the consent of the senate, and to hold his office for four years. Bills passed by the council and house of delegates were to be presented to him for approval or rejection. A secretary of the district is also provided for, whose duties are specified. The legislative power in the district is vested in two bodies, a council and house of delegates, called a legislative assembly, which power it was in the 18th section declared should "extend to all rightful subjects of legislation within said District, consistent with the constitution of the United States and the provisions of this act." It is enacted that the President, with the consent of the senate, shall appoint a board of health, consisting of five persons, whose duties are pointed out. The salaries of the governor and secretary are prescribed, and are to be paid "at the treasury of the United States." The salaries of the members of the legislative assembly are prescribed, but it is not declared where or how, or by whom they shall be paid, unless they are included in the general terms of section thirty-eight

By the 37th section it is provided that there shall be a "board of public works, to consist of the governor and four other persons to be appointed by the President with the consent of the senate, who shall have entire control of and make all regulations which they shall deem necessary for keeping in repair the streets, avenues and alleys and sewers of the city, and all other works which may be entrusted to their charge by the legislative assembly or Congress." They are also required to disburse the money collected for such purposes, and to make an annual report of their proceedings to the legislative assembly, and to furnish a duplicate of the same to the governor.

The charters of the cities of Washington and Georgetown are declared to be repealed, except that they are continued in force for certain specified purposes, not necessary to be here considered.

The statute creating this corporation in its first section declares it to be a body corporate, not only with power to contract, to sue and be sued, and to have a seal, but also that it is a body corporate for municipal purposes, and that it shall exercise all other powers of a municipal corporation, not inconsistent with the constitution and laws of the United States and the provisions of this act. 16 Stat. p. 419.

A municipal corporation, in the exercise of all of its duties, including those most strictly local or internal, is but a department of the state. The legislature may give it all the powers such a being is capable of receiving, making it a miniature state within its locality; again, it may strip it of every power, leaving it a corporation in name only, and it may create and re-create these changes as often as it chooses, or it may itself exercise directly within the locality any or all the powers usually committed to a municipality. We do not regard its acts as sometimes those of an agency of the state, and at others those of a municipality, but that its character and nature remaining at all times the same, it is great or small according as the legislature shall extend or contract the sphere of its action.

In his work on municipal corporations (at § 835) Judge Dillon says: "As the highways of a state, including streets in cities, are under the paramount and primary control of the legislature, and as all municipal powers are derived from the legislature, it follows that the authority of municipalities over streets, and the uses to which they may be put, depends entirely upon their charter, or legislative enactments applicable to them. It is usual in this country for the legislature to confer upon municipal corporations very extensive powers in respect to streets and public ways within their limits, and the uses to which they may be appropriated. The authority to open, care for, regulate and improve streets, taken in connection with the other powers usually granted, give to municipal corporations all needed authority to keep the streets free from obstructions and to prevent improper uses, and to ordain ordinances to this end."

A corporation can act only by its agents or servants. This obvious truth does not imply that the acts must be done by inferior or subordinate agents, but, on the contrary, the higher the authority of the agent, the more evident is the responsibility of the principal. While a state may be represented n various ways, no one will doubt that its act when declared through the means of its legislature or its governor, within their respective spheres, is more emphatically obligatory upon it than when made known through its inferior departments.

A municipal corporation may act through its mayor, through its common council, or its legislative department, by whatever name called, its superintendent of streets, commissioner of highways, or board of public works, provided the act is within the province committed to its charge. Nor can it in principle be of the slightest consequence by what means these several officers are placed in their position, whether they are elected by the people of the municipality or appointed by the President or a governor. The people are the recognized source of all authority, state and municipal, and it is to this authority it must come at last, whether immediately or by a circuitous process.

An elected mayor or an appointed mayor derives his authority to act from the same source, to wit, that of the legislature. The whole municipal authority emanates from the legislature. Its legislative charter indicates its extent and regulates the distribution of its powers, as well as the manner of selecting and compensating its agents. The judges of the supreme court of the state may be appointed by the governor with the consent of the senate, or they may be elected by the people. But the powers and duties of the judges are not affected by the manner of their selection. The mayor of the city may be elected by the people, or he may be appointed by the governor with the consent of the senate, but the slightest reflection will show that the powers of the officer, his position as the chief agent and representative of the city, are the same under either mode of the appointment. Whether his act in a case in question is the act of and binding on the city depends upon his powers under the charter to act for the city, and whether he has acted in pursuance of them, not at all upon the manner of his election. It is equally unimportant from what source he receives his compensation, or whether he serves without compensation.

When the enquiry is whether an individual is acting for himself or for another, the enquiry whether that other directed him to do the work and controlled its performance, and whether he promised to pay him for his service, may be important in determining that question. In a case

like the one before us, where all the actors are in some form under the same authority, where all are created by the same legislature, and it is a question of the distribution of conceded power, these suggestions are unimportant.

Nor are these by any means conclusive considerations in any case. A striking instance to the contrary is found in the case of The China, 7 Wall. 53. It is there held that, although the master of the vessel is bound to take a pilot on board his vessel, and bound to take the first one offering his services, the owners are responsible for a collision caused by the negligence of the pilot thus in charge of the vessel.

In the case of the municipal corporation before us, we have no doubt that the mayor and the legislative department are equally representatives and agents of that body, unaffected by the circumstance that the one is appointed by the President and the others are elected by the people, or that the one is paid from one source and the others from another source. They are severally members and parts of a municipal corporation whose charter emanates from the Congress of the United States, and by which their powers and authority are conferred or defined.

Whether the board of public works is also a part of and an agency of the municipal corporation is the question before us.

1. The authorities state, and our own knowledge is to the effect, that the care and superintendance of streets, alleys and highways, the regulation of grades, the opening of new and the closing of old streets, is peculiarly a municipal duty. No other power can so wisely and judiciously control this subject as the authority of the immediate locality were the work is to be done. Accordingly, although complaints are often made of corruption and venality, as they are, indeed, of all public functionaries, and attempts made to substitute other agencies, the general judgment of the country has always accepted the municipal organization as the one subject to the least objection for the execution of this duty. In enquiring, therefore, where this power was vested in a particular case, we should expect to find that it was given to the municipality

2. The act of Congress of February 21, 1871, is entitled "An act to provide a government for the District of Columbia," and its intention is to accomplish that end by the means of a municipal corporation called the District of Colunbia. The powers given to it are to contract, sue and be sued, to have a seal and all other powers of a municipal corporation, not inconsistent with the constitution and laws of the United States or the provisions of this act. The powers thus given are to be exercised by the means and agencies in the act specified, and unless these means and agencies do represent the corporation, it has nothing and does nothing. It is a nonentity. The first of these is the existence of a governor, who is invested with the executive power in and over the District of Columbia. This office is a large type of a mayoralty, and his acts or declarations or notices or services upon him, within the sphere of executive authority, are those of or upon the municipal corporation.

The legislative assembly also is a large edition of a common council, and is the especial power and organ of the municipality in regulating its ordinary business and affairs.

The 37th section defines and locates the power to regulate and repair the streets and highways of the District of Columbia. The persons there referred to are invested with the entire control of the streets, their regulation and repair. It is declared that there shall be "a board of public works," of whom the chief agent of the city corporation, viz, the governor, shall be one, and four other persons, to be nominated by the President, and to this board is given the power specified. The full text of the section is as follows:

BOARD OF PUBLIC WORKS.

"SEC. 37. *And be it further enacted*, That there shall be in the District of Columbia a board of public works, to consist of the governor, who shall be president of said board; four persons, to be appointed by the President of the United States, by and with the advice and consent of the senate, one of whom shall be a civil engineer, and the others citizens and residents of the District, having the qualifications of an elector therein; one of said board shall be a citizen and resident of Georgetown, and one of said board shall be a citizen and resident of the county outside of the cities of Washington and Georgetown. They shall hold office for the term of four years, unless sooner removed by the President of the United States. The board of public works shall have entire control of and make all regulations which they shall deem necessary for keeping in repair the streets, avenues, alleys, and sewers of the city, and all other works which may be entrusted to their charge by the legislative assembly or Congress.

"They shall disburse upon their warrant all moneys appropriated by the United States or the District of Columbia, or collected from property-holders, in pursuance or law, for the improvement of streets, avenues, alleys, and sewers and roads and bridges, and shall assess in such manner as shall be prescribed by law, upon the property adjoining and to be specially benefited by the improvements authorized by law and made by them, a reasonable proportion of the cost of the improvement, not exceeding one-third of such cost, which sum shall be collected as all other taxes are collected.

"They shall make all necessary regulations respecting the construction of private buildings in the District of Columbia, subject to the supervision of the legislative assembly.

"All contracts made by the said board of public works shall be in writing, and shall be signed by the parties making the same, and a copy thereof shall be filed in the office of the secretary of the district; and said board of public works shall have no power to make contracts to bind said district to the payment of any sums of money, except in pursuance of appropriations made by law, and not until such appropriations shall have been made. All contracts made by said board, in which any member of said board shall be personally interested, shall be void, and no payment shall be made thereon by said district, or any officers thereof. On or before the first Monday in November of each year, they shall submit to each branch of the legislative assembly a report of their transactions during the preceding year, and also furnish duplicates of the same to the governor, to be by him laid before the President of the United States for transmission to the two houses of Congress; and shall be paid the sum of two thousand five hundred dollars each annually."

1. The four persons composing this board are nominated by the President, and hold their offices for a fixed period of time. They can not be removed, except by the President of the United States. The same thing is true of the governor and of the secretary of the District, except that as to them there is no power of removal. Each is appointed in the same manner and holds until the expiration of his term and until his successor is qualified. The same is true, also, of the members of the council, except that their term is of shorter duration. It is true, also, in relation to the house of delegates, except that they are elected by the people and hold their offices for a fixed term of one year. We have already endeavored to show that it is quite immaterial, on the question whether this board is a municipal agency, from what source the power comes to these officers, whether by appointment of the President or by the legislative assembly or by election.

2. This board is invested with the entire control and regulation of the repair of streets and alleys, and all other works which may be entrusted to their charge by the legislative assembly or Congress. They shall disburse all the money appropriated by the legislative assembly or by Congress, or collected from property-holders for the improvement of streets and alleys. It is to be noticed here, that the municipal corporation, as represented by the legislative assembly, may impose upon this board such other duties as they think proper. The board is to perform "all other work entrusted to their charge by the legislative assembly or Congress." In this respect, certainly, it is not an independent body. It is subject to two masters, either of whom may impose upon it any other work it may choose, and which work it is bound to perform. Its dependence upon Congress and upon the legislative assembly in this respect rests upon the same basis. It will not be claimed by any one that it is not subject to the control of Congress and dependant upon that body.

3. The board shall disburse all moneys appropriated by the United States or the District of Columbia, or collected from property-holders for improvements of streets or alleys. In doing the two acts here first specified, the board again acts as the hand and agent of the United States or of the District, as the case may be.

4. On or before the first Monday of each year the board is required to make a report of their transactions during the preceding year to each branch of the legislative assembly, and also to the President, to be placed before Congress by him. This duty is also an indication of their subordination equally to Congress and to the legislative assembly. The powers given to this board are not of a character belonging to independent officers, but rather those which indicate that it is the representative of the municipal corporation.

Notwithstanding these features, and notwithstanding we find this power given by the act which creates the municipalty, and that this is one of the powers ordinarily belonging to a municipal government, and although the manner of its bestowal and the selection of the agents who exercise it are similar to that of the other appointees and agents of the municipal corporation, it is still contended that no liability exists on the part of the corporation to compensate the plaintiff for his injuries.

It is denied that a municipal corporation (as distinguished from a corporation organized for private gain) is liable for the injury to an individual arising from negligence in the construction of a work authorized by it. Some cases hold that the adoption of a plan of such a work is a judicial act, and if injury arises from the mere execution of that plan, no liability exists. Child v. Boston, 4 Allen, 41; Thayer v. Boston, 19 Pick. 511. Other cases hold that for its negligent execution of a plan good in itself, or for mere negligence in the care of its streets or other works, a municipal corporation can not be charged. City of Detroit v. Blackely, 21 Mich. 84, is of the latter class, where it was held that the city was not liable for an injury arising from its neglect to keep its sidewalks in repair.

The authorities establishing the contrary doctrine, and that a city is responsible for its mere negligence, are so numerous and so well considered that the law must be deemed to be settled in accordance with them. *English Authorities.*—Mayor v. Henley, 2 Cl. & Fin. 331; Mersey Docks v. Gibbs; Same v. Penhallow, 1 H. Ld. Cas. N. S. 93; 1 H. & N. 439; Lan. Canal Co. v. Parnably, 11 Ad. & Ellis, 223; Scott v. Mayor, 37 Eng. Law & Eq. 465. *United States Authorities.*—Weightman v. Washington, 1 Bl. 39; Nebraska v. Campbell, 2 Bl. 590; Robbins v. Chicago, 4 Wall. 658; Superv's v. U. S., 4 Wall. 435; Mayor v. Sheffield, 4 Wall. 194. *New York Authorities.*—Davenport v. Ruckman, 37 N. Y. 568; Requa v. Rochester, 45 N. Y. 129; Rochester W. L. Co. v. Rochester, 3 N. Y. 463; Conrad v. Ithaca, 16 N. Y. 158; Barton v. Syracuse, 36 N. Y. 54. *Illinois Cases.*—Browning v. City of Springfield, 17 Ill. 143; Claybury v. City of Chicago, 25 Ill. 535; City of Springfield v. LaClare, Chicago Legal News, Apl. 3d, 1870. *Alabama Cases.*—Smoot v. Mayor of Wecumpka, 24 Ala. N. S. 112. *Connecticut Cases.*—Jones v. City of New Haven, 34 Conn. *North Carolina Cases.*—Meares v. Wilmington, 9 Iredell, 73. *Maryland Cases.*—County Commissioners of Anne Arundel County v. Duckett, 20 Md. 468. *Pennsylvania Cases.*—Pittsburgh City v. Grier, 22 Penn. 54; Erie City v. Schwingle, Ib. 388. *Wisconsin Cases.*—Cook v. City of Milwaukee, Law Register for April, 1870, Vol. 9, N. S. P. 263; Ward v. Jefferson, Ib. *Virginia Cases.*

—Sawyer v. Corse, 17 Grattan, 241; City of Richmond v. Long, Ib. 275. *Ohio Cases.*—Western College v. Cleveland, 12 Oh. 377, N. S.; McCombs v. Akron, 15 Oh. 476; Rhodes v. Cleveland, 10 Ib. 159.

And here a distinction is to be noted between the liability of a municipal corporation, made such by acceptance of a village or city charter, and the involuntary *quasi* corporations known as counties, towns, school districts, and especially the townships of New England. The liability of the former is greater than that of the latter, even when invested with corporate capacity and the power of taxation. 1 Dillon, §§ 10, 11, 13; 2d, § 761. The latter are auxiliaries of the state merely, and when corporations are of the very lowest grade and invested with the smallest amount of power. Accordingly, in Conrad v. Ithaca, 16 N. Y. 158, the village was held to be liable for the negligence of their trustees, while in West v. Brockport, the town was said not to be liable for the same acts by their commissioners of highways. Ib. 163, 4, 9; see "Brooks' Abridgment," "Action on the Case;" Russell v. Men of Devon, 2 T. R. 308, and cases there cited; 16 N. Y. *supra*. Whether this distinction is based upon sound principle or not, it is so well settled that it can not be disturbed. Decisions or analogies derived from this source are of little value in fixing the liability of a city or a village. See Dillon, *supra*.

Again: It is contended that the board of public works of the District of Columbia is an independent body, acting for itself, not forming a part of the corporation, and that the corporation is not responsible for its acts. We have analyzed the power of this body in a previous part of this opinion, and have set out in full the language of the 37th section.

Upon this point, also, we are able to derive assistance from the adjudged cases.

The case of Bailey v. Mayor, in the Supreme Court of New York, 3 Hill, 531, and again in the court of errors, 2 Denio, 431, is a leading authority upon this question. In the year 1834 the legislature of the state of New York passed an act "to provide for supplying the city of New York with pure and wholesome water." Sess. Laws 1834, p. 531. The act provided that the governor should appoint five persons, to be known as water commissioners, whose duty it was made to examine all matters relative to that subject (§ 2); to employ such engineers as they should deem necessary (§ 3); to adopt such plan as they should deem most advantageous for procuring such supply of water; to ascertain the amount of money needed for the purpose, and to make conditional contracts for the purchase of lands required, subject to the ratification of the common council of New York (§ 4). The plan, the estimates of the expense, the conditional contracts, and all other matters connected therewith, were to be presented by the commissioners to the common council of New York, (§§ 5-6), who were directed to submit the plan to the electors of New York for their rejection or approval (§ 7). If approved, the council were to direct the commissioners to proceed with the work, and the council was authorized to raise by loan $2,500,000, which money was to be applied to the purposes of the act "by or under the direction of the commissioners" (§ 11). The commissioners were authorized to enter upon lands, agree for their purchase or take measures for their condemnation, (§§ 12, 13, 14), and to use the ground or soil under any street or highway within the state for the purpose of introducing the water (§ 15). The commissioners were authorized to draw on the city comptroller for all sums due for the purchase of lands, and sums due to contractors, and for their own incidental expenses, and the payments were required to be reported to the council once in every six months.

Under this statute a plan was prepared and approved by the citizens of New York, money was raised, and the work was entered upon. It was proved that the commissioners entered into a contract with Crandall & Van Zandt for building a dam across the Croton river, which was about forty miles from the city of New York and in another county, in pursuance of the plan adopted. The plaintiff offered also to prove that it was so negligently and carelessly constructed, that upon the occurrence of a freshet in 1841 it was swept away, and the property of the plaintiff, real and personal, situate on both sides of the river below the dam, was destroyed to the value of $60,000. The circuit judge rejected the evidence and directed the plaintiff to be non-suited. The case was carried to the supreme court, where the non-suit was set aside. The judgment was delivered by Nelson, C. J., whose opinion opens in these words: "The principal ground taken at the circuit against this action, and the one upon which it was understood the cause there turned, was that the defendants were not chargeable for negligence or unskillfulness in the construction of the dam in question, inasmuch as the water commissioners were not appointed by them nor subject to their direction or control." The learned judge repudiates the argument arising from the fact that the commissioners were appointed by the state; that the defendants had no control over their actions; that they were bound to employ them and submit to the independent exercise of their control. He held that the commissioners were the agents of the city, and that the latter was responsible for their negligent conduct.

The case was then carried to the Court of Errors of the State of New York (2 Denio, 433), where the judgment of the supreme court was affirmed. Chancellor Walworth bases his opinion of affirmance chiefly upon the fact that the city was the owner of the land on which the dam was built, and, therefore, liable for the negligent conduct of those who built it. Senators Hand, Bockee and Barlow based their judgments of affirmance on the ground that the commissioners were the agents of the city. Gardner, lieutenant-governor, delivered an able dissenting opinion.

This case is nearer to the one we are considering than any other reported in the books. The struggle in the New York courts was between the dictates of that evident justice and good sense which required that the city should indemnify a sufferer for the loss arising from the acts of those doing a work under its authority and for its benefit, and the technical rule which exempted it from liability for acts of officers not under its control or appointed by it.

If these courts had had before them the additional facts which exist in this case, to wit, that in the very statute which made the city of New York a municipal corporation these persons had been appointed to do everything necessary to be done respecting the care and improvement of the streets, being invested with their exclusive control; that without that body, and two other equally independent bodies, to wit, the mayor and the legislative assembly, neither of them being declared in words to be parts of the municipal body, the municipal corporation had no one part of an organized existence, we think they would have arrived at the same conclusion, but would have found less difficulty in choosing a ground on which to place their judgment.

In the case before us, we think that Congress intended to make the board of public works a portion of the municipal corporation. The governor, or mayor, as he would ordinarily be called, representing the executive department; the legislative assembly, like a common council, had the exclusive authority to pass all laws or ordinances upon the large class of subjects committed to its charge, with certain specified restrictions; and to the board of public works, like an ordinary agent of the corporation, was given the exclusive control of the streets and alleys. Names are not things. Perhaps there is no restriction on the power of Congress to create a state within the limits of the District of Columbia, but it does not make an organization a state to call its mayor a governor, or its common council a legislative assembly, or its superintendent of streets a board of public works, especially when the statute by which they are created opens with a declaration of its intention to create a municipal corporation. We take the body thus organized to be a municipal corporation, and that its parts are composed of the members referred to, and we hold, therefore, that the proceedings by that body, in the repair and improvement of the street, out of which the accident in question arose, are the proceedings of the municipal corporation. That in such case the corporation is responsible, we have already cited the authorities to show.

No doubt there are authorities holding views not in all respects in harmony with those we have expressed. Among these are Thayer v. Boston, 19 Pick. 510; Walcott v. Swampscott, 1 Allen, 101; Child v. Boston, 4 Allen, 41. The first of these cases holds that a city corporation is liable in tort, provided the act is done by the authority and order of the city government, or those branches of the government invested with authority to act for the corporation; but that it must appear that the act was done by the express authority of the city, or *bona fide* in pursuance of a general authority on the subject. To this we assent. Walcott v. Swampscott was an action against a town. The supervisor of highways employed one O'Grady to drive a horse and cart with a load of gravel for the repair of a highway, and while thus engaged, he came in collision with the plaintiff. The town was held not to be liable, on the theory that the surveyor was not an agent or servant of the town, but an independent officer appointed to perform a public duty in which the town had no interest. In Child v. The City of Boston, it was held that the city was not responsible for any deficiency in the plan of drainage adopted by the city, although the plaintiff was injured thereby; that the duty in this respect was of a *quasi* judicial nature, involving discretion, and depending upon public considerations; that in this they acted, not as agents of the city, but as public officers. In this respect the case is in hostility to Roc. White Lead Co. v. Rochester, 3 N. Y. 463, where the city was held liable because it constructed a sewer which was not of sufficient capacity to carry of water draining into it. The work was well done, but the adoption and carrying out of the plan was held to be an act of negligence. The Boston case, however, held that if a sewer, originally well constructed, becomes defective by reason of low lands being filled up so that the outflow is obstructed, it becomes the duty of the city so to extend the sewer that its efficiency should be restored, and that for a failure to do so, it becomes liable to those whose property was injured by the overflow of the sewer. In its practical results this is one of the strongest cases to be found in favor of municipal liability.

We do not perceive that the circumstance that the fee of the street is in the United States, and not in the municipal corporation, is material to the case. In the most of the cities of this country the fee of the land belongs to the adjacent owner, and upon the discontinuance of the street the possession would revert to him. The streets and avenues in Washington have been laid out and opened by competent authority. The power and the duty to repair them is undoubted, and would be no different were the streets the absolute property of the corporation. The only questions can be as to the paticular person or body by which the power shall be exercised, and how far the liability of the city extends.

The judgment of the general term is reversed, and the case is remanded to the Supreme Court of the District of Columbia, with directions to affirm the judgment of the special term upon the verdict.

Dissenting, Mr. Justice SWAYNE and Mr. Justice STRONG.

FIELD, J.—I dissent from the judgment in this case. I do not think the District of Columbia should be held responsible for the neglect and omissions of officers whom it has no power to select or control.

Mr. Justice BRADLEY concurs in this dissent.

Maxwell v. The District of Columbia.

This is an action to recover damages for injuries sustained by the plaintiff on the first day of March, 1872, in consequence of the unsafe condition and the negligent management of the streets of the District of Columbia. The court below ruled that the District was not liable, and directed a verdict for the defendant.

The case is controlled by that of Barnes against the District, in which the opinion has just been delivered.

The judgment is reversed and a new trial ordered.

Dant v. The District of Columbia.

This is an action to recover damages sustained by the plaintiff on the 14th of November, 1871, in consequence of the unsafe condition and negligent management of the streets of the District of Columbia. The court below ruled that the district was not liable, and directed a verdict for the defendant.

The case is controlled by the principles governing that of Barnes against the District, in which the opinion has just been delivered.

The judgment is reversed and a new trial ordered.

Amendatory Bankrupt Act of 1874—Corporations.

IN RE THE OREGON BULLETIN PRINTING AND PUBLISHING COMPANY.

United States Circuit Court, District of Oregon.

Before Hon. LORENZO SAWYER, Circuit Judge.

1. Revised Statutes and other Acts Passed at Same Session.—The Revised Statutes must be regarded as passed on the first day of December, 1873, and all other acts of the same session of Congress passed subsequent to that date are to be treated as subsequent acts, repealing the Revised Statutes, so far as they are inconsistent therewith.

2. Amendatory Bankrupt Act of 1874 Construed.—The act of June 27, 1874, (18 Stat. 178), purporting to amend and supplement the bankrupt act of 1867, must be regarded as having passed subsequent to the passage of the Revised Statutes, and although referring in terms to the act of 1867, must be construed as referring to the provisions of that act as carried into, and expressed in the corresponding provisions of the Revised Statutes; and as amending and supplementing the provisions of the statutes relating to bankruptcy as therein expressed.

3. Corporation—Number of Petitioning Creditors.—Since the passage of the amendatory and supplemental bankrupt act of June 22, 1874, the same proportion of creditors must join in a petition seeking an adjudication in bankruptcy against a corporation as is required in the case of natural persons.

4. Character of Corporation Alleged.—A petition in bankruptcy against a corporation, which does not show that the corporaton is either a moneyed, business or commercial corporation, is insufficient.

Opinion by SAWYER, Circuit Judge.

In September, 1875, certain creditors filed a petition in bankruptcy in the district court against the Oregon Bulletin Printing and Publishing Company, a corporation organized under the laws of Oregon, in which they alleged that they constituted one-fourth in number of the creditors, and held one-third in amount of the aggregate provable debts of the corporation, the amount due them exceeding four thousand dollars; that within the preceding six months the corporation had committed several acts of bankruptcy, for that being insolvent, said corporation made sundry payments to certain creditors named, with intent to give such creditors preference; and in another instance procured certain of its property to be taken on legal process with like intent, and praying, that for these causes, the corporation be adjudged a bankrupt.

The corporation answered the petition, among other things denying that the petitioners constituted one-fourth in number of its creditors, or that they held one-third of its aggregate debts, and filed a separate statement in writing to the same effect.

The petitioners moved to strike out these denials as irrelevant, on the ground that the provisions of section 39 of the bankrupt act of 1867, as amended by section 12 of the act of 1874, requiring one-fourth in number of the creditors, representing one-third in amount of the aggregate debts of the bankrupt, to join in the petition, do not apply to corporations. The district judge sustained that view, and struck out both the denials of the answer, and the corresponding allegations of the petition relating to the number of creditors and the amount of indebtedness. The corporation seeks a reversal of this ruling; and the question is, whether under the statute, as it now stands, a corporation can be adjudged a bankrupt upon a petition of a single creditor, or any number less than one-fourth of the whole, and without regard to the amount of the debts.

The district judge in an elaborate and very able opinion, which merits, and which has received, the most careful and respectful consideration, held the affirmative of the proposition. 13 N. B. Reg. 200. On the other hand, *In re* Leavenworth Savings Bank, the District Judge of the Second District of Kansas adjudged the point the other way; and this ruling was affirmed, on a petition for review, by Mr. Circuit Judge Dillon in a well considered opinion, notwithstanding the opinion of the district judge in this case, which was cited at the hearing. 3 CENT. L. J. 207. So far as I am aware, these are the only adjudications directly upon the point, and as there is no authoritative decision upon the question by the supreme court, it will be necessary to examine the question anew. Certainly no more important question has arisen under the bankruptcy act, and it deserves the most deliberate examination.

The Revised Statutes, which embodied in a different arrangement the provisions of the bankrupt act of 1867, and repealed the latter as a separate and independent act, were actually passed on the same day with the act of June 22, 1874, purporting to amend and supplement the act of 1867 so repealed. Which of the two acts passed first in point of time on that day does not appear. It is necessary to a proper discussion of the question presented, to ascertain and keep in view the relation of these two statutes to each other. Section 5595 provides, that "The foregoing seventy-three titles embrace the statutes of the United States general and permanent in their nature, in force on the first day of December, one thousand eight hundred and seventy-three," etc. And the following sections repeal the previous acts. It is plain, that, whatever the result, the intent was in this act to express without change of sense, in a different form and arrangement, all the general statute law of the United States as it existed on December 1, 1873;—to substitute this arrangement and expression for prior *acts as of that date*, and to adopt that date as the dividing line by which its relation to all other legislation subsequent to December 1st, should be determined. In accordance with this intention, section 5601 provides, that "The enactment of the said revision is not to affect or repeal any act of Congress passed since the first day of December, one thousand eight hundred and seventy-three, and all acts passed since that date are to have full effect as if passed after the enactment of this revision, and so far as such acts vary from, or conflict with, any provision contained in said revision, they are to have effect as subsequent statutes, and as repealing any portion of the revision inconsistent therewith."

Thus, by express enactment, the Revised Statutes, for the purpose of determining their relation to other legislation at the same session, are to be regarded as though passed on the first day of December, 1874, and all other acts passed subsequent to that date, although in fact passed before the Revised Statutes, are to be treated and enforced as subsequent statues, repealing the Revised Statutes so far as they are inconsistent therewith. Under these provisions, the act of June 22, 1874, purporting to amend and supplement the bankrupt act of 1867, must be regarded as passed subsequent to the passage of the Revised Statutes, and although referring in terms to the act of 1867, must be construed as referring to the provisions of that act as carried into, and expressed, or in the language of the act "*embraced*" in the corresponding sections of the statutes; and as amending and supplementing the provisions of the statutes relating to bankruptcy as therein found expressed. This must be so, for the Revised Statutes expressly repeal the bankrupt act of 1867; and the act of 1874 being construed as subsequent to the Revised Statutes, or on any other hypothesis, so far as it is amendatory of the act of 1867, would simply amend, that is to say, change, the reading of certain portions of an act already repealed, and no longer in force, without re-enacting it into a law. The result would be the amendment only of parts of a repealed statute, without re-enacting it into a law, while the corresponding provisions of the Revised Statutes would remain in force unchanged, except in those parts expressly repealed by section 21 inconsistent with the amendments, *and as to those parts so repealed, there would be no statute at all in force.* This clearly could not have been the intention of Congress. The amendatory and supplementary act, therefore, must be construed as amending the provisions of the Revised Statutes, corresponding to, and substituted for, the sections of the act of 1867 purported to be amended in the amendatory act; and the other provisions of said act as supplementing the provisions of the Revised Statutes under the title, Bankruptcy. Any other construction would result in nothing but the grossest absurdity. So construed, section 12 of the act of 1874, purporting to amend section 39 of the act of 1867, must be construed as amending sections 5021, 5022 and 5023 of the Revised Statutes.

The decision of the question under consideration, then, must depend upon the construction put upon the Revised Statutes as thus amended. Section 5122 provides, that "The provisions of this title shall apply to all moneyed, business or commercial corporations, and joint-stock companies." This provision is comprehensive, and embraces every provision of the title, "Bankruptcy" except those which are inconsistent with some express or necessarily implied limitation, or which from the inherent character of corporations can not, in the nature of things, be made applicable; as for example, a corporation can not, in the nature of things, be arrested or imprisoned. Section 5023 provides that, "An adjudication in bankruptcy may be made on the petition of one or more creditors the aggregate of whose provable debts amounts to at least two hundred and fifty dollars." This is one provision of the title—is general and comprehensive—and is applicable to corporations, under the provisions cited from section 5122, unless clearly repugnant to some other provision expressly relating to corporations; and there is no such provision, unless it be found in the clause, "or upon the petition of any creditor of such corporation or company," in section 5122. Are these two provisions necessarily, or by any reasonable construction, upon a consideration of the whole title, and the general policy indicated in it, repugnant? In my apprehension they are not. It must be borne in mind, that the principles upon which the act proceeds, and all the details and specific provisions relating to matters of bankruptcy, are prescribed in the other sections; and that the provisions of section 5122, relating to corporations, are intentionally brief, general and incomplete, specifically providing merely for inherent differences between corporations and natural persons, and referring to the other provisions of the title for particulars unaffected by such inherent differences. Thus, it was necessary to indicate in what way the corporate will should be manifested in a voluntary petition, as questions might arise upon this point, and did in fact arise under the act, as plain as it seems to be. *In re* Lady Bryan Co., 1 Sawyer, 350, and it was accordingly provided, that it should be by "petition of any officer of such corporation or company, duly authorized by a vote of the majority of the corporators at any legal meeting called for the purpose." It was not left to the trustees, then, but the interests of the stockholders were thus carefully guarded by this provision. Having mentioned by whom the petition should be filed in a case of voluntary bankruptcy, it was natural and proper to indicate *the party*

to file the petition in the correlative case of an involuntary bankruptcy, and it accordingly named as *the party* "any creditor of such corporation or company." In both cases it indicated *the person* to apply, without either *referring to the amount* in which the corporation must be indebted to constitute an "act of bankruptcy," or the amount to which the party must be a creditor to entitle him to petition. These were specified in other provisions made applicable by the first clause of the section, and it was not necessary to repeat them here. So, as the officers of a corporation are not the corporation, and it is sometimes necessary to operate upon them to reach the corporation, another provision in the section to meet inherent differences between corporations and natural persons makes certain enumerated provisions of the title applicable to natural persons also applicable to the *officers* of the corporation. So, also, as corporations have no need of homesteads, or other property usually necessary to the subsistance and existence of natural persons, who are debtors, and their families, and as its stockholders are, also, usually personally liable for its debts, it is provided in this section, that "no allowance or discharge shall be granted to any corporation," and accordingly that "*all* its property and assets shall be distributed" as "in the case of natural persons." These are the points of difference briefly indicated, and all other provisions not specifically enumerated, and expressly made applicable by the comprehensive introductory words of the section. Suppose section 5023 had read: "An adjudication of bankruptcy, either against *a natural person or corporation*, may be made on the petition of one or more creditors, the aggregate of whose provable debts amounts to at least two hundred and fifty dollars;" section 5125 reading, as it does now, "upon the petition of any creditor of such corporation," would these two clauses have been repugnant? Could they not have both stood together, one indicating only the relation of the party to the bankrupt necessary to give him the proper *status*, and the other the amount of the indebtedness which should be requisite to justify troubling the courts, and the parties with the proceeding? Could there be any doubt under such provisions of the statute that the creditor or creditors of a corporation must be creditors to the aggregate amount of two hundred and fifty dollars, to entitle them to an adjudication in bankruptcy against the corporation? The question does not appear to me to admit of argument. The provisions would be construed together, and while one provision would authorize a creditor to petition, the other would require him to be a creditor for the amount of, at least, two hundred and fifty dollars. But the provisions as they now stand in the Revised Statutes, are just as broad and comprehensive. Section 5023 is general and covers every case. The interpolation of the hypothetical phrase "either against a natural person or a corporation," does not in any degree enlarge the scope of the provision. If the two provisions are not repugnant in the supposed case, they are not so as they are. Besides, the provision of section 5023, was a part of section 39 in the act of 1867, which was introduced by the words, "any person," and these provisions had direct reference to the word "person." The provision is "any person who, etc., * * * shall be adjudged a bankrupt on the petition of one or more of his creditors the aggregate of whose debts provable under this act shall amount to at least two hundred and fifty dollars," and section 48 provided that "the word 'person' shall also include 'corporation,' so that under this provision defining the word 'person,' as used in the act, the statute did, in fact, read as though written, 'Any person or corporation * * * shall be adjudged a bankrupt on the petition of one or more creditors, the aggregate of whose debts provable under this act shall amount to at least, two hundred and fifty dollars,'" exactly in effect, as I have supposed section 5023 to read in this opinion, for the purpose of illustration; and the several provisions of that act must be so read for the purpose of giving a proper construction. So reading it, there can be no doubt that effect can be given to both provisions, and they are not repugnant. But the Revised Statutes only broke this section up into three sections, without any intention in any way to change the sense. Again, if under section 5122, a creditor can have a corporation adjudged bankrupt without regard to the amount due him, for the same reason, the corporation may be adjudged bankrupt without being indebted to the amount of three hundred dollars, and without committing any act of bankruptcy as defined in the act at all. The section says, "any officer properly authorized may petition, or that a creditor may petition," without saying that the corporation must be indebted to the amount of three hundred dollars, or in any other amount. It does not say that the mere filing of a petition, either by the corporation or a creditor, shall constitute an act of bankruptcy on the part of a corporation, nor does it say what shall constitute an act of bankruptcy. We must go elsewhere to find what constitutes an act of bankruptcy on the part of a corporation, or else we must imply, that filing a petition by an authorized officer, whether there is any indebtedness or not, or the filing of a petition by a creditor, to the amount of a dollar, is an act of bankruptcy. If we go back to section 5021, we find that a provable indebtedness exceeding the amount of three hundred dollars is *an essential element in an act of involuntary bankruptcy;* and by section 5014, a like amount of indebtedness is an essential element in an act of voluntary bankruptcy. In the latter case, "the filing of such petition" by a person owing the prescribed amount (see first clause), "shall be an act of bankruptcy," (last clause). Unless the provisions of these sections apply, there is nothing prescribing what shall constitute, in either case, an act of bankruptcy on the part of a corporation. If they do apply, then there must be a provable indebtedness to an amount exceeding three hundred dollars; for that amount of indebtedness is just as much an element in an act of bankruptcy under those sections, as any other element therein mentioned. Again, under section 5023, (so, also, section 39 of the act of 1867), an adjudication might be made "on the petition of one or more creditors the aggregate of whose provable debts amounts to at least two hundred and fifty dollars, provided such petition is brought within six months after the act of bankruptcy shall have been committed." This proviso is also omitted in section 5122, and the time within which the petition is to be brought is no more a part of the "manner provided in respect to debtors," than is the amount of indebtedness due the petitioning creditors, and we have no greater right to incorporate this proviso into section 5122, than we have the other half of the same sentence relating to the amount of two hundred and fifty dollars. It is all in a single sentence. In the case of a corporation, is there to be no limit as to the time when the proceeding is to be brought? If not, why the distinction? I do not suppose that anyone would be bold enough to maintain that the provisions under consideration would all, or any of them, be inapplicable to partnerships, because in section 5121 the phrase is "or on the petition of any creditor of the parties," without adding the clause to the amount of "at least two hundred and fifty dollars." Yet these particulars are no more included in the provision of the latter part of the section, "in all other respects the proceedings against partners shall be conducted in the like manner, as if they had been commenced and prosecuted against one person alone," than they are in the similar provision in regard to corporations in the next section. I do not perceive why the same reasoning which would make the limitations inapplicable to corporations would not, also, make them inapplicable to partners. Besides, section 5122 embraces joint-stock companies, as well as corporations, and these in law are only partnerships composed of natural persons. Why should there be any distinctions in these particulars between different kinds of partnerships, or between natural persons acting alone, or in connection with others in different forms of partnerships?

In my judgment, after a careful consideration of the various provisions of the act, the specific provisions of section 5122, so far as they go, are controlling in respect to corporations; but that all other provisions of the title of an additional character omitted to be mentioned in this section not repugnant to any of its express provisions, and not in the nature of things intrinsically inapplicable, are made applicable to corporations by the introductory clause of the section. "The provisions of this title shall apply to all moneyed, business or commercial corporations," read in connection with the words of definition in other sections; and that the amount of indebtedness exceeding three hundred dollars, necessary to constitute an act of bankruptcy; the amount two hundred and fifty dollars that must be due to a creditor in order to entitle him to file a petition; and the proviso, as to the time when the petition must be filed in the case of natural persons, are all applicable to corporations; that these matters having been provided for by other provisions made applicable by the first clause in section 5122, and other provisions there, was no occasion to repeat them in that section, and they were accordingly omitted with other omitted particulars. But if one of these provisions is inapplicable to corporations, all must be, and one creditor, to no matter how small an amount, may control the matter without regard to the interest of other creditors or stockholders, without any limitation as to time when the proceedings are to be instituted, and in a case where the aggregate indebtedness of the corporation is too insignificant to justify troubling the parties or the courts with the litigation.

Upon the construction adopted, the provisions of the bankrupt act operates uniformly, and are harmonious in all particulars where there are no inherent characteristic differences between corporations and natural persons, and different provisions are made only to meet such differences. This is what we should expect to find in a statute.

If I am right in the construction given to the Revised Statute unaffected by the amendment of 1874, there can be no further difficulty in the case, for the amendment is clearly as broad and comprehensive as the unamended statute. If wrong, the amendment contains inherent evidence either that Congress supposed my construction to be the correct one, and acted upon that view, or else, that it intended the amendment to be broader in its scope, and to include corporations in all its provisions not in the nature of things inapplicable.

That the amendment was intended to apply to corporations, whatever the proper construction of the former act, to my mind seems clear.

Section 5013 of the Revised Statutes, like section 48 in the act of 1867, provides that, "In this title the word 'creditor' shall include the plural also; * * * the word 'person' shall also include 'corporation.'" The statute has itself defined the word "person," for the purposes of the act, not for some sections only, but wherever it occurs; and that definition includes "corporation." "Creditor," in section 5122, means also creditors, and "person" in 5021, corporations. Under this definition, we are authorized *and required* to read the words, "any person," in the amendments of 1874, "any person or corporation." Read in connection with the provisions relating to an act of bankruptcy of the character alleged in the petition in this case, omitting the parts inapplicable, the section, as amended in 1874, provides as follows: "Any person or *corporation* residing and owing debts as aforesaid, who after the passage of this act * * * being insolvent * * * shall make any payment * * * of money * * * or procure his property to be taken on legal process with intent to give a preference to one or more of his creditors * * * shall be deemed to have committed an act of bankruptcy, and subject to the conditions hereinafter prescribed, shall be adjudged a bankrupt *on the petition of one or more creditors who shall constitute one-fourth thereof, at least, in number, and the aggregate of whose debts provable under this act amounts to at least one-third of the debts so provable. Provided, that such petition is brought within six months after such act of bankruptcy shall have been committed.*" Reading the section in this way, as we are authorized and re-

quired to do, the language of the section is not open to any other construction than that which makes the whole applicable to corporations as well as to natural persons. The section is unbroken, and is not divided and can not be divided so as to make one part applicable to natural persons only. Either *the whole* section must be applicable to corporations, *or no part of it is*, and in the latter case *there is no provision which declares what act of a corporation, or that any act constitutes an act of bankruptcy.* The word person in this amendment is not accidentally or inadvertently, but deliberately, brought within the definition of that word as given in section 5013; for in a subsequent part of the same section, Congress in repeated instances specifically mentions a class of corporations as being some of the persons embraced in the word person, as used in the introduction of the section. Thus, "That any person * * * *who being a bank* or banker * * * has fraudulently stopped payment * * * or *who being a bank* * * * has stopped or suspended, and not resumed, payment * * * or *who being a bank* * * * shall fail," etc. * * * "Shall be deemed to have committed an act of bankruptcy, and subject to the conditions hereinafter prescribed, shall be adjudged a bankrupt on the petition of one or more of his creditors, *who shall constitute one-fourth thereof, at least, in number*, and the aggregate of whose debts provable under this act amounts *to at least one-third of the debts so provable.*" The words "who" and "bank," refer directly to the word "person" as their antecedent, showing that a bank at least, was intended to be included in the word "person," and by express provisions, that a bank can only be thrown into bankruptcy on the petition of one-fourth in number of its creditors, who represent one-third in amount of its provable debts. That the word "bank," as used, means or at least includes incorporated banks does not seem to admit of discussion. The term is general, without anything to indicate any limitation on its meaning. It includes all banks of whatever character. It is the very word in universal use when a corporation for banking purposes is intended, and rarely, if ever, used in speaking of a natural person—the word banker being the more appropriate term, and the one ordinarily used to designate natural persons engaged in banking business. Both terms are used in the statute, showing that Congress intended to include every species of banks. The word "bank" was not used in prior statutes, while banker was, which is all that is necessary to designate natural persons acting as bankers. Showing that in this act, at all events, *banking corporations were intended to be included.* The word is not used for the purpose of extending the meaning of the word person, but is introduced in defining a particular act of bankruptcy, as though, as a matter of course, a bank was included in the word "person." It is manifest from this specific recognition of a class of corporations as being some of the persons embraced in the words "any person," in the beginning of the section, that Congress intended to use that word in this section in the broad and comprehensive sense indicated by the definition in section 5013; and used in that sense, there is no escaping the conclusion that the subsequent provision relating to the number of petitioning creditors, and the amount of debts that must be represented by them, are expressly made applicable to corporations. And again, the section provides that, "the provisions of this section shall apply to *all cases*,"—not all cases of natural persons, or all cases other than those of corporations, or to some cases—but to "*all* cases of compulsory or involuntary bankruptcy commenced since the first day of December, eighteen hundred and seventy-three, as well as to those commenced hereafter. And *in all cases* commenced since the first day of December, eighteen hundred and seventy-three, and prior to the passage of this act, as well as to those commenced hereafter, the court shall, if such allegation as to the number or amount of petitioning creditors" be denied by a debtor, by statement in writing to that effect, require him to file forthwith a full list of his creditors, etc. I am unable to perceive how corporations can by any reasonable or even possible admissible construction be excluded from the operation of the clause under consideration. If by expressly defining the terms used so as to include corporations, then by expressly naming a class of corporations as embraced within the terms so used and defined, and immediately in connection therewith employing the comprehensive words, "in all cases," which must include cases against corporations as well as natural persons, and further providing in terms without limitation, that "the provisions of this title shall apply to" corporations, Congress does not express an intention to include corporations, it is difficult to see how such an intention could be manifested in any way short of enacting a separate statute relating alone to corporations, which should embrace all the provisions intended to be applicable, without any reference to any other statute or provision relating to natural persons, or other matters.

If I am right in my view of the amendment of 1874, it must prevail, whatever the construction put upon the provisions of previous acts, since it is the last expression of the legislative will, and it repeals all inconsistent provisions wherever found, as well those of section 5,122, if those are inconsistent, as of 5,021, 5,022 and 5,023.

In the very able opinion of the district judge, it is said, inadvertently, I think, "the statute provides that 'a person' shall be entitled to a certain allowance out of his property, and, under certain circumstances, to a discharge of his debts. Now, in those two cases, the word 'person' does not include a corporation, because the statute, section 5,122, Revised Statutes, expressly provides that no allowance or discharge shall be granted to any corporation" etc. I do not find the word "person" used at all in the statute in the connection here referred to. The "allowance out of his property" is provided for in section 5,045 of the Revised Statutes, and 14 of the act of 1867, and the discharge in Revised Statutes, section 5,114, and 32 of the act of 1867. In all these cases the word used is "bankrupt," and not "person," so that the argument suggested falls with the erroneous hypothesis. I find no instance in the act where the word "person," would not appropriately include a corporation, as the statute says it shall, except one or two, where, in the nature of things, it could not apply, as where an arrest is provided for; and no instance in which, if construed to include a corporation, it would, upon any reasonable construction, make it repugnant to any other provision of the statute. If there is any such instance, it has escaped my notice.

It is further said, that the definition of the word "person," in section 5,013 of the Revised Statutes, is limited to the word "person," as used "in this title;" that the amendment of 1874 is an independant act, which is no part of "this title," and therefore that it does not embrace the word "person," as used in the Revised Statutes. The title is Bankruptcy," and in contemplation of the Revised Statutes at the time of their supposed passage, it embraced all the statute law upon the subject of bankruptcy. In the beginning of this opinion, it is held that the amendatory provisions of the act of 1874, for reasons stated, although referring by name and section to the repeated act of 1867, must be construed as amending the corresponding sections of the Revised Statutes. Upon this view, the amendatory provisions fall into the place of the sections of the Revised Statutes amended, as amendments, and thus become a part of the title of the Revised Statutes amended, and are brought within the operation of the defining section 5,013. Section 12, of the act of 1874, revises and embodies the entire subject-matter of sections 5,021–22–23 of the Revised Statutes, and upon well-settled principles of construction takes the place of and repeals all those sections. Besides, section 21 expressly repeals all acts and parts of acts inconsistent with the provisions of the act of 1874. If the amendments do not become a part of the Revised Statutes, as amendments thereto, they simply amend a repealed statute which is no longer in force, and the corresponding provisions of the Revised Statutes being repealed also, there is no statute in force under which any adjudication in bankruptcy can be had. In my judgment, the amendatory sections fall into the Revised Statutes, and become parts of the title amended.

It seems impossible, by any reasonable construction of the amendment of 1874, to take a bank, though a corporation, out of the operation of the provisions under consideration; yet the creditors of a bank are usually far more numerous and more difficult of ascertainment, especially in the case of banks at issue, than those of any other class of corporations. If banks are not excluded from the operation of the provisions relating to the number of creditors and amount of debts represented necessary to entitle them to file a petition, I can see no possible reason for excluding any other class of corporations, and, in my judgment, none are excluded. No distinction between the different classes of corporations is anywhere indicated. If Congress should make any distinction between corporations and natural persons, in the particulars in question, we should expect to find some sound and obvious reason for its action. If no sound reason can be found, and the point is doubtful, we ought to conclude that no distinction is intended. No reason has been suggested and none occurs to me that appears to my mind to be sound. It also appears to me to be a mistaken supposition that a modern corporation is in effect destroyed by an adjudication in bankruptcy—that being stripped of its property it can acquire no more. Such seems not to be the doctrine of the books. Miners' Ditch Co. v. Zellerbach, 37 Cal. 590. If so destroyed, a corporation created by the act of one sovereignty is annihilated by the act of another sovereignty. In many of the United States, perhaps generally, in respect to recently formed moneyed business and commercial operations—the class embraced in the bankrupt act—the stockholders are personally liable for the indebtedness of the corporation. The corporation is but an instrument in the hands of the stockholders, and the stockholders themselves, being personally liable, are the ultimate debtors, as well as the parties ultimately enjoying the benefits of the organization.. The ultimate effects of an adjudication in bankruptcy against such corporations, as to the excess of indebtedness over assets, reach natural persons. It may be greatly to the interest, not merely of the stockholders, but the great mass of creditors, that there should be no adjudication against the corporation, even though insolvent. It is fair to presume that the stockholders, and three-fourths in number and two-thirds in value of the creditors, will act in such manner as they suppose their common interests dictate, as well in the case of corporations as where the bankrupt and primary debtor is a natural person; and I can perceive no sound reason why a less number than one-fourth in number and one-third in value of the creditors, should control the proceeding against the wishes and interests of the great majority in one case more than in the other. The corporation, though insolvent, may repair its capital, and the interests of all concerned may require this to be done. It is, in fact, sometimes done, as the very remarkable recent instance of the Bank of California, so notorious as to become a part of the public history of the country and of the financial world, shows. The bank stopped payment. Its reputed indebtedness exceeded twenty millions—generally understood to be several millions in excess of its assets. It was, therefore, largely insolvent. Its capital stock had all been paid up and absorbed. Yet, by the forbearance of its creditors and the energy of its stockholders, its capital stock was repaired, as this court had occasion judicially to know, by levying new assessments in pursuance of authority given by the statutes under which it was organized, upon the stock already fully paid up, and its business resumed under such auspices as to give promise of a future no less brilliant than its past. Had it been in the power of a small part of the creditors to have thrown this institution into bankruptcy, and it had been exercised, it would doubtles have severely shaken the finances of the Pacific Coast, if not of the whole country, and have proved a great public calamity. So, also, it is understood that after the sweeping public calamity of the Chicago fire several of our insurance corporations, whose resources had become

largely impaired, repaired their capital in a similar way, and continued on in a prosperous career. These striking examples show that at least under our system of personal responsibility, corporations, as well as individuals, have strong recuperative powers, and, if not otherwise trammeled than natural persons, may in like manner recover from the effects of extraordinary misfortunes. To my mind, these examples afford a strong argument against any good grounds for a distinction between modern moneyed business and commercial corporations and natural persons, in the particulars under consideration. The policy of the amendment on this point may be good or bad—with this the courts have nothing to do—but if good for one, it seems to me to be good for both. I am, myself, unable to find any solid ground for a distinction in this respect between this class of corporations and natural persons, and I am also unable to find anywhere in the statute the distinction claimed, or any evidence of an intent to make such a distinction.

The case of the New Lamp Chimney Co. v. The Ansonia Brass and Copper Co., 13 N. B. Reg. 385, has been cited by respondents' counsel as an authority in favor of the views of the district judge and opposed to the view taken in this opinion, and by Mr. Circuit Judge Dillon *in re* Leavenworth Savings Bank. There is one clause in the opinion of Mr. Justice Clifford, in the enumeration of the points of the provisions of section 37 of the act of 1867, which seems at first view to favor the construction which it is cited to sustain. It is as follows: "Second. The petition for involuntary bankruptcy may be made and presented by any creditor without any specifications as to the number of the creditors or the amount of their debts." This, however, was not a point adjudged, nor did the point arise in the case. There was no question in it as to whether, in the case of involuntary bankruptcy of a corporation, a single creditor, without regard to the amount due him, is entitled to file a petition. There is nothing in the case to indicate that this point was either argued by counsel or carefully considered by the court. In illustrating the argument upon the point presented, the learned judge refers to other provisions of the act, and, among other things, recites the several points as specified in section 37. He nowhere says that the provisions of other sections relating to the amount of indebtedness do not apply to corporations, but only that this section is "without any specification as to the number of the creditors, or of the amount of their debts," which is manifestly true, but without saying what the effect on it of other provisions is. It is quite a different question, whether in determining the right of a creditor to petition, this provision simply stating the relation of the party to the corporation necessary to give him the proper status—a right to an adjudication—or simply designating the party, shall be supplemented by the other provisions providing for the required amount of indebtedness, not inconsistent with the clause, so far as it goes, made applicable by other express provisions, and therefore not necessary to be repeated here. Such casual observations in the course of an argument, even where more in point than in this case, are never regarded by the supreme court or the judge who makes them, as authoritative. The reports are full of instances where *dicta* of a far more pertinent and decided character are wholly disregarded. I have attempted to show in the first part of this opinion that the other provisions as to amount being additional and not inconsistent are made applicable by the general comprehensive introductory clause of section 37, and by other defining clauses of the act referred to. And this view seems to me to be sustained also by the other observations of Mr. Justice Clifford immediately preceding and following the clause quoted from his opinion. Besides, the learned judge, in that same opinion, distinctly lays down the rule of construction. We are not to hunt for repugnances, but rather aim to harmonize the various provisions of the act. And there is certainly no repugnancy between the clause in section 37, which named a creditor as *the person* who is to petition, and the clause in section 39, which *fixes the amount* for which he must be a creditor to entitle him to petition; and considering both provisions as applicable harmonizes best with all the provisions of the act, and with the idea of a uniform system, so far as in the nature of things it can be made uniformly applicable. The learned justice in that case found no difficulty in harmonizing provisions far more distinctly repugnant. But it must be borne in mind that the case in the supreme court arose under the act of 1867, and the observations of the learned justice were made upon that act as it existed before its amendment. Whatever the proper construction of that act, it does not necessarily control the present act. There seems to be no mistaking the scope of the amendment of 1874, and if found inconsistent with anything in section 5,122, or elsewhere in the Revised Statutes, it must prevail, as being the last expression of the legislative will. The case of The New Lamp Chimney Co. v. The Ansonia Brass and Copper Co. was also cited by counsel in the Leavenworth Savings Bank case, and could not, therefore, have been considered by the learned judge who heard it as inconsistent with the construction put by him upon the amendment in question of 1874.

For these reasons, in addition to those expressed by Mr. Circuit Judge Dillon in the case of the Leavenworth Savings Bank, I hold that to authorize an involuntary adjudication in bankruptcy against a corporation under the statute as amended in 1874, the petitioning creditors must constitute one-fourth thereof, at least, in number, the aggregate of whose debts provable under the act amount to at least one-third of the debts so provable.

There is no allegation in the petition in this case, that the corporation is either a "moneyed business or commercial corporation," and the character of the corporation can only be inferred from the name and the averment that its place of business is at Portland. The petition would undoubtedly be held bad on demurrer. No objection was taken until the issues formed were about to be submitted to the jury, when the point was raised for the first time in the form of an instruction to the jury asked of the court. It was with hesitation denied, on the ground that it came too late. Whether this ruling was correct or not, the petition should be amended in this particular.

The adjudication in bankruptcy and the order striking out the allegations in the petition and corresponding denials in the answer relating to the number of petitioning creditors, and amount of debts represented by them, must be reversed and the case remanded for further proceedings, and it is so ordered.

Pleading—Statute of Limitations—Discovery of Fraud.

In the case of Young v. Whittenhall, decided at the December term, 1875, (see 3 CENT. L. J. 431), the Supreme Court of Kansas pass upon a question not frequently found in the reports. The question is this: In an action for equitable relief on the ground of fraud, where the time constituting the statutory bar had elapsed between the *commission* of the fraud and the commencement of the action, is the petition demurrable as being barred by the statute of limitations, if it does not allege that the fraud was *discovered* within the time limited by statute? In other words, where the pleader shows that the fraud was *committed beyond* the statutory time, must he also allege that it was *discovered within* the statutory time?

The case above referred to takes the affirmative of this question, holding that a demurrer was properly sustained in such a case, because the petition did not affirmatively show that the fraud on which the action was based was discovered within the statutory limitation. In the opinion of the court in that case, three cases from California are cited as holding the same view. On the other hand, the Supreme Court of Iowa in Harlin v. Stevenson, 30 Ia. 371, affirm the contrary doctrine, and hold that the plaintiff in such a case need not allege the time of discovery of the fraud, and if he does allege it, he need not prove it.

The first class of cases go upon the ground that the suspending the operation of the statute during the time when the plaintiff was ignorant of the fraud prastised upon him is an exception to the general rule, and to show himself entitled to the benefit of that exception, the plaintiff must bring himself within it. Hence, he must plead that he was ignorant of the fraud practised until a time within the statutory period.

The Iowa case goes upon the ground that the plea of the statute is an affirmative defence; that the defendant must plead all the facts necessary to constitute the bar, if he wishes to avail himself of it; that as the statute does not begin to run till discovery of the fraud by plaintiff, his petition will not be demurrable unless it expressly shows the time of such discovery to be beyond the statutory bar, and that when such fact does not appear on the face of the petition, the defendant must allege it and prove it, as he must any other affirmative defence.

The statute on which the Iowa court gave its decision is as follows:

"2740. The following actions may be brought within the time herein limited, respectively, after these causes accrue, and not afterwards, except when otherwise specially declared, that is to say: 3. Those * * * for relief on the ground of fraud in cases heretofore solely cognizable in a court of chancery, * * * five years. 2741. In actions for relief on the ground of fraud as above contemplated, the cause of action will not be deemed to have accrued until the discovery of the fraud by the party aggrieved."

Having closely examined the question, and having concluded that the Iowa case declares the same doctrine, with your permission, I will briefly state my reasons for such conclusions.

1. In order to show that a cause of action is barred, it is necessary to show that the statute commenced to run at a time so long prior to the commencement of the suit that the full statutory time had elapsed. Now in this class of cases, the statute expressly says that the cause of action shall not be deemed to have accrued until the fraud was discovered by the injured party. Hence, in the absence of any allegation as to the time of such discovery, there is nothing to show that the statute had commenced to run at all.

2. The bar of the statute is an affirmative defence, and the party relying upon it must plead the facts necessary to constitute the bar. One of the most important of allegations, in truth, almost the only important allegation in this plea, is that showing when the statute commenced to run. But in this class of cases, the showing when the fraud was committed does not show when the statute commenced to run. The statute does not commence to run on the *commission* of the fraud, but on the *discovery* of it, and without an allegation of the time of *discovery* of the fraud, the petition would not show whether the action was barred or not, and the plaintiff is not required to show negatively that the action is *not* barred. He is merely prohibited from showing affirmatively that the action *is* barred.

3. The Kansas court speak of *exceptions* to the general rule, and say in substance, that where a party relies upon an exception to a general statute, he must plead the facts constituting the exception. And this is really the ground of their decision. Admit that when a party relies upon the exceptions to a general rule he must plead the facts constituting the exception, and how much does that help the decision? Not at all. What constitutes the exception? Not the *discovery* or *non-discovery* of the fraud, but the *commission* of the fraud. The exception exists not merely in favor of those who did not discover the fraud, but in favor of *all* those who were injured by the fraud. Hence, when a plaintiff pleads the facts showing him entitled to equitable relief on the ground of fraud he pleads the very facts which constitute the exception, and brings himself fully within it. But more than this, we do *not* admit that the statute which makes the limitation begin with the *discovery* of

the fraud is an exception to the general rule. It is a *general* statute applicable to a certain class of cases, and applicable to all cases of that class. The exception which the Kansas court had in its mind at the time of deciding the case referred to, must have been the well known case where the plaintiff's pleading shows that the statute *commenced to run* so long prior to the beginning of his suit, that the full statutory time had elapsed, and he relies on a new promise, or absence from the state, or some other ground, to suspend the operation of the statute, or to take his case out of it. Nothing is clearer than that in such a case, he would have to plead the facts on which he relied to save his case from the bar. And why? Simply because he had shown that the statute *commenced to run* so long before the beginning of his suit as to constitute the bar, and having thus shown that his case was barred, he must show the facts which removed the bar. But in the class of cases under discussion, he does not show *when* the statute commenced to run, if he merely show when the fraud was committed, and not having shown when the statute commenced to run, he does not show that his case is barred.

4. I can think of but one other ground on which the supporters of the Kansas case can hope to rely, viz: That in the absence of all showing, the *law will presume* that the fraud was discovered at the time it was committed; and that the cases in which it was not then discovered constitute the exception spoken of.

Now there can be no legal presumption that the fraud was, or was not, discovered at any particular time. The presumption must be, if there is any at all, that the fraud was *not* discovered at the time it was committed. The very substance of fraud is that it is unknown to the party injured by it, and no one ever heard of any body being injured by a fraud which he discovered at the very time of its commission. The whole case really turns upon this point. If the law presumes discovery of fraud at the time of its commission, the Kansas case is right, but if it does not, and we have no doubts whatever on this point, then the Iowa case is right.

HIRAM SHAVER.

NEW HAMPTON, IOWA.

Book Notice.

A DIGEST OF THE LAW OF EVIDENCE. By JAMES FITZJAMES STEPHEN, Q. C. London: Macmillan & Co., 1876.

In a volume of hardly more than one hundred pages, the author has undertaken to give a complete statement of the law of evidence. In the year 1870, Mr. Stephen was employed to draw a code of evidence for India. This he succeeded in accomplishing, his bill, known as the Indian Evidence Act, being adopted in 1872. The act repealed the whole law on that subject then in force in India, and enacted in 167 sections a thorough and complete code. In his "Introduction to the Indian Evidence Act," published several years ago, Mr. Stephen explained his plan in detail, and predicted that, so far as it was possible for any written law to be perfect, his work would meet the requirements of the country, and reduce this extremely intricate branch of the law to a few elementary principles, readily understood and easily followed. His hopes have, to a great extent, been fulfilled. The code has been in work in India for over five years; it has given great satisfaction, very rarely requiring judicial exposition or construction. In the autumn of 1872, shortly after the Indian act had become law, Mr. Stephen was employed by the attorney-general of the government of the day, to draw a similar code for England. This he performed, the bill was introduced by the ministry in the session of 1873, and ordered to be printed, but before any further steps could be taken, a general election had swept the ministry from power, and its sponser having taken refuge on the bench as chief justice of the common pleas, the bill was dropped and has not since been introduced.

The "Digest of the Law of Evidence," which we are examining, is Mr. Stephen's code under another name. The work is well worthy the study and consideration of every lawyer. The principles of the law of evidence, as contained in the thousands of cases decided by the courts in the course of almost two hundred years, and, as amended, always by piecemeal, in the acts passed at different times, each amending a particular principle or part of a principle, leaving the rest sometimes as they originated, but more often mutilated and unintelligible, are here set out clearly and distinctly, and in a space not much greater than Mr. Taylor, in his work, has devoted to the single question of judicial notice. The author devotes himself entirely to principles; from the mass of precedents he has evolved the law as it is in its elementary propositions. He believes with Lord Mansfield, whose words in Rex v. Benridge, 3 Doug. 332, he quotes, that the law does not consist of particular cases, but of general principles, which are illustrated and explained by these cases. We are ready to agree with Mr. Stephen that the labor bestowed upon his work has been in an inverse ratio to its size.

The arrangement of the work is excellent. In three parts, which are divided into seventeen chapters, and subdivided into one hundred and forty articles, or sections, are arranged, under their proper heads, the different branches of this part of the law, which Mr. Stephen considers to properly belong there. This arrangement follows the author's plan in his Indian code and his projected English bill. A new feature which he advocates is worth considering. Plato, we know, required that all laws should commence with a preamble in which the necessities of the law, as well as the reasons for its being observed, should be set out. Mr. Stephen would have each section of his code end with an illustration, which would serve, he believes, in a great measure, in assisting to construe it, where the words themselves might be open to ambiguity. We select two sections as examples. *Article 19. Admission by Party referred to by Party.* When a party to an action or proceeding expressly refers to any other person for information in reference to a matter in dispute, the statements of that other person may be admissions as against the person who refers to him. *Illustration.* The question is, whether A delivered goods to B. B says: "If C will say that he delivered the goods, I will pay for them." C's answer may, as against B, be an admission. And again, *Article 50. Facts bearing upon Opinions of Experts.* Facts, not otherwise relevant, are relevant if they support, or are inconsistent with, the opinions of experts, when such opinions are relevant. *Illustrations.* (a) The question is, whether A was poisoned by a certain poison. The fact that other persons who were poisoned by that poison exhibited certain symptoms, which experts affirm or deny to be the symptoms of that poison, is relevant. (b) The question is, whether an obstruction to a harbor is caused by a certain bank. An expert gives his opinion that it is not. The fact that other harbors similarly situated in other respects, but where there were no such banks, began to be obstructed at about the same time, is relevant. Whether illustrations can be used with advantage in public acts will, no doubt, receive very different answers, and will probably, if brought to public attention, be an open question with both jurists and philosophers. Lord Coleridge's opinion was in their favor, but he had very serious doubts whether they could be made acceptable to parliament. Were such a practice to become universal, a volume of public acts fresh from a granger legislature would be sure to furnish if not instructive, at least entertaining, reading.

This is a work of such decided merit, that it is much easier to praise than to criticize it. It is particularly interesting at the present time, when jurists are already, both in England and America, looking forward to the time which some of them believe to be not far distant, when a code of law, shall be an accomplished fact. But we are forced to say that Mr. Stephen has but half done what he started out to perform. What he essayed to simplify, he has only succeeded in anatomizing. He undertook to explain the whole frame, and in order to do so, he found himself forced, at the start, to cut off all the limbs. He is then abie to deal with the subject in a manner more satisfactory to himself than to his readers, who, while admiring what he has done, can not help remembering what he has left undone. All law, according to the author, may be divided into substantive law, by which rights, duties and liabilities are defined, and the law of procedure, by which the substantive law is applied to particular cases. The law of evidence is that part of the law of procedure, which, with a view to ascertain individual rights and liabilities in particular cases, decides: First, what facts may, and may not, be proved in such cases. Second. What sort of evidence must be given of a fact which may be proved; and, third, by whom and in what manner the evidence must be produced by which any fact is to be proved. Under the first head, come all questions as to relevancy, and the different sorts of evidence, such as hearsay, opinion, and character evidence. The second division embraces the manner of proof by primary, secondary, documentary or oral evidence, as the case may be, and the third would include those questions which go to the competency and credibility of witnesses. These the author regards as constituting the law of evidence. The question as to what may be proved under particular issues, which is one of the most extensive and troublesome questions in the law, he says belongs partly to the subject of pleading, and partly to each of the different branches into which the substantive law is divided. The whole subject of presumptions he relegates to the same place. So, the rules which relate to the attendance of witnesses, to the taking of evidence by commission, to the administration of interrogatories and the authentication of depositions, etc. The ease with which Mr. Stephen wafts these troublesome questions to the realms of civil and criminal procedure recalls the old tale of the Magician and the Palace of Aladdin. Mr. Stephen has already made a name as a legal author; he is a scholar and a tireless worker. It would surprise no one should he, before long, appear as an author in another branch of the law. He will there find his old friends under the new names which he has given them, and we can only hope that the meeting will be a happy one. We have our fears that it will be as Alexander cutting the knot at Gordium, only to find it again still more complicated and entangled at Arbela.

Recent Reports.

FOURTH NEBRASKA REPORTS. REPORTS OF CASES IN THE SUPREME COURT OF NEBRASKA, 1875-6. Vol. IV. GUY A. BROWN, official reporter. Des Moines, Iowa: Mills & Co., 1876.

This is a volume of six hundred pages, and contains the cases decided by the Supreme Court of the State of Nebraska, at the January and July terms, 1875, and the January term, 1876,—nearly a hundred in all. Two of the opinions printed in this volume have been already reported in full in the JOURNAL, viz: Union Pacific R. R. v. Commissioners of Colfax County, 3 CENT. LAW JOURNAL, 287, on the railway aid law of Nebraska, and B. & M. R. R. v. Lancaster County, Ib. 369, on the construction of the revenue law of that state. The cases have been prepared with care by the reporter, the arguments of counsel and the cases cited being given in nearly every case. Besides the index of cases decided, there is also an index of all cases referred to by the counsel or the court. The typographical execution of the work is very good, and though the volume contains many opinions relating to particular statutes in force in the state, there are not a few cases of general interest to the profession. We add several for the benefit of our readers, who, if they wish to read them in full, can apply for a volume of the reports.

Limitation of Action—Absence.—*Blodgett v. Utley*, p. 25. 1. The mere temporary absence of a debtor from the state, when such debtor has a usual place of residence therein where service of summons can be had upon him, does not suspend the statute of limitations. 2. The

words "usual place of residence" mean the place of abode at the time of service.

Attachment.—*Handy v. Brong.* An attachment, under the code of Nebraska, can not be maintained in an action of tort.

Criminal Practice — Challenge — Argument of Counsel.—*Palmer v. The State*, p. 68. 1. Under the provisions of the criminal code, it is not error to permit a juror to sit in a cause, who, although on oath, says, he "had an opinion and expressed an opinion;" also says, he "could under an impartial verdict upon the law and the evidence." The record disclosing no basis for the opinion, it will be presumed that the court was satisfied that it was merely hypothetical, and not one calculated to bias the juror. 2. A party waiving his right of peremptory challenge can not complain of the disqualification of a juror, known to exist at the time of the impaneling. 3. If an attorney for a prisoner voluntarily waives his right to argue the case to the jury, he can not, after they have retired to consider their verdict, insist, as a matter of right, to have the jury recalled for the purpose of hearing such argument.

Practice—Rendition of Verdict.—*Young v. Seymour et al.*, p. 86. During the consideration of a cause submitted to a jury, court adjourned until 9 A. M. of the following day, the judge, at the time, announcing aloud that the court would be at all times open for the purpose of receiving the verdict of the jury in the case then being considered by them, if they should agree upon their verdict before midnight. At 11 P. M. the judge went to the court room, and in the absence of all the officers of the court, except the bailiff in charge of the jury, and in the absence of the parties to the suit and their counsel, received the verdict of the jury, discharged them from further consideration of the case, kept the verdict until the opening of court on the following morning, and, after having read it aloud in open court, handed it to the clerk for entry upon the records. *Held* a privy verdict, and of no force and validity, not having been affirmed by the jury in open court.

Jurisdiction of United States Courts in Nebraska. *Painter v. Ives*, p. 122. The federal courts have no jurisdiction of the crime of larceny, alleged to have been committed on an Indian reservation in the state of Nebraska. All the territory embraced within the boundaries of the state was withdrawn from the jurisdiction of the federal courts by the act admitting the state into the Union.

Sale—Warranty—Principal and Agent.—*Nichols et al. v. Hail*, p. 210. In an action upon a promissory note, given in part consideration for a threshing machine, the defence was warranty of the machine and a breach of the conditions. It appeared in evidence that the defendant gave one M. an order for a certain kind of thresher, on the back of which was a printed warranty. The order was sent to the agents of plaintiffs, but it was not accepted nor the machine mentioned therein furnished, and M., acting for the agent, sold defendants an old machine, they knowing it to be such, giving their note therefor, and using the machine. *Held*, that the warranty did not extend to the machine purchased, and parol evidence of its contents was inadmissible. 2. The mere fact that the agent of plaintiffs suing upon a note payable to him, received it from a person selling a machine, in consideration of which the note was given, will not of itself estop the plaintiffs from denying that such person was their agent in the sale, but it should be left to the jury to say that if the machine was the property of plaintiffs at the time of the sale, they would be justified in finding agency from the fact that the note was made payable to them.

Liability of Bank for Acts of President.—*McCann et al. v. The State*, p. 324. The United States, being indebted to the state of Nebraska, drew two drafts upon its treasury in favor of "W. H. James acting Governor, or order." The drafts were endorsed by James and by him delivered to McCann, a stockholder and the president of a bank. The drafts were given to McCann in the banking-house, the cashier endorsed the same and the bank received the proceeds. A portion of the fund was paid by McCann to O'Hawes, who had been the agent authorized by James to collect the same from the general government, and a large part of the balance paid to James on individual checks drawn by him from time to time, some upon McCann, and others upon the bank, but none of the amount was ever paid into the state treasury. *Held*, in an action against James, McCann and the bank, that the drafts being the property of the state, James had no interest therein whatever; that he could not transfer except to the state treasurer, who is the sole fiscal officer of the state; that the drafts contained on their face sufficient to put a purchaser on enquiry as to whether or not James was the owner; that notice to McCann was notice to the bank; that the bank was liable for the full amount of the drafts, nor would any deduction be made on account of payment to O'Hawes, such payments being made without authority of law.

Chattel Mortgage—Injunction.—*Adams v. Nebraska City Nat. Bk. et al.*, p. 370. A mortgage of chattels transfers to the mortgagee the whole legal title to the thing mortgaged, subject only to be defeated by performance of the condition, but the mortgagor may redeem the property at any time before sale, where, upon default in the payment of a debt secured by a chattel mortgage, the mortgagee took possession of the property, and on the same day the owner of a judgment against him levied thereon. *Held*, that an injunction would not lie at the instance of the mortgagee, restraining a sale under the levy.

Criminal Law—Defence—Insanity.—*Wright v. The State*, p. 407. Where in a criminal case, the accused relies upon insanity as a defence, the burden of proof is on the prosecution to prove sanity. In sustaining such a defence, where there is testimony to rebut the legal presumption that the accused was sane, unless the jury are satisfied beyond a reasonable doubt that the act complained of was not produced by mental disease, they must acquit. But the degree of mental unsoundness, in order to exempt a person from punishment, must be such as to create an uncontrollable impulse to do the act charged. If it be found insufficient to deprive the accused of ability to distinguish right from wrong, he should be held responsible for the consequences of his acts.

State Boundaries.—*Holbrook v. Moore*, p. 437. A change in the main channel of the Missouri river does not alter the boundary line between Iowa and Nebraska, as established by Congress. It remains as before, in the old abandoned river bed.

Homestead—Mortgage.—*The State v. Carson*, p. 498. A proper construction of the statutes of this state makes a judgment recovered in the district court, a lien upon all the real estate of the debtor, situated in the county where the judgment is recovered. But no sale can be had of the proper portion selected as a homestead by the testator, as long as the premises so selected are owned and occupied for that purpose. 2. Judgment was rendered against W., at a time when he occupied certain premises as a homestead, execution issued, levy made, and returned not sold for want of bidding. During these proceedings W. made no claim to any part of said premises as a homestead, and for a time after the recovery of the judgment, abandoned the same *Held*, in a suit to foreclose a mortgage given by W. and wife, on the same premises, after the rendition of said judgment, that the judgment was a prior lien.

Notes of Recent Decisions.

Omission to Notify Assured of Lapse of Policy—Tender.—*Leslie v. Knickerbocker Ins. Co.* New York Court of Appeals. 5 Ins. Law Journal, 429. Opinion by Folger, J. When the officer of a company having authority, promises to notify the holder of a life policy which was in the company's possession when the premium is due, and omits so to do for the purpose of procuring a lapse, the owner has the right, within a reasonable time after the omission, to tender the amount, and such tender, and tender again when the premium again becomes due, keeps the policy alive. Evidence tending to show such a promise by a person at the cashier's desk during business hours, who showed a knowledge of the policy, in the absence of evidence that he was not authorized to make such a promise, and the omission of the company in this case to send a notice in accordance with its general custom, and a knowledge and discussion at the office of the ill health of the insured, justified the court in so charging, and the jury in finding for the owner of the policy.

General Authority of Agents.—*Mentz v. Lancaster Fire Ins. Co.* Supreme Court of Penn. 5 Ins. Law Journal, 447. Opinion by Sharswood, J. Where agents are acting for an insurance company, and are held up to the public as such, the reasonable presumption is that they are authorized to act for the company in a general way, unless the company specify what may be their specific duties and powers.

Statute of Limitations—Coverture—Guardian and Ward—Actions on Bonds.—*State v. Parker.* Supreme Court of Tenn. Nashville Leg. Rep., July 5, 1876. Opinion by Lea, J. 1. Where the right of action had accrued, and afterwards the statute is suspended, and during the suspension plaintiff is married, the coverture, existing at the end of the suspension, cannot be relied on to defeat the bar. 2. A ward is not barred because the statute has run as to the guardian. The doctrine that when the trustee is barred the *cestui que trust* is also barred, does not apply to guardian and ward. 3. Sureties upon several bonds may be sued at the same time. It is not necessary to exhaust the property of the guardian and sureties on the last bond, before bringing suit against sureties on the first.

Authority of Agent—Extent.—*Taylor v. Vingert.* Common Pleas of Philadelphia. 32 Legal Int. 238. Opinion by Briggs, J. The agent of the mortgagee to collect the interest has not thereby an implied authority to collect and receive the principal; neither will such unauthorized receipt of the principal bind the assignee of the mortgagee.

Escrow—Effect of Putting a Release of a Mortgage on Record by Mistake.—*Stanley v. Valentine et al.* Supreme Court of Illinois. 8 Chicago Leg. News, 347. Opinion by Walker, J. 1. Where a release of a mortgage was made by the mortgagee, and left in escrow with a third person, and before the performance of the conditions under which the release was deposited, and without any delivery to the mortgagor, the release, by mistake or accident, was filed for record, and was recorded, *held*, that judgment-creditors acquire no rights or advantage by such recording, and that an injunction will lie to restrain such creditors from selling under the levy of an execution anything more than the equity of redemption of the mortgagor. 2. The recording of the release, under such circumstances, constitutes a cloud upon the title of the mortgagee, which a court of equity will remove. 3. The mortgagee, by making such a release and placing it in escrow with an agent, by whom it was placed on record by mistake, is not estopped to deny that it is his deed; especially so, where judgment-creditors only of the mortgagor seek to take advantage of the record of the release, or they advance no money, give no credit, or do any act by which they change their attitude to the case. See Smith v. Royalton Bank, 32 Verm. 341; People v. Bostwick, 32 N. Y. 450; Everts v. Agnes, 4 Wis. 453; Black v. Schreve, 13 N. Y. 458; Dyson v. Bradshaw, 23 Cal. 536; Ogden v.

Ogden, 4 Ohio St. 191. From these authorities, it would appear that even a grantee is not protected by a purchase, however honestly and fairly he may have acted, unless there was a delivery to his grantors.

The "Club" System an Illegal Device to Evade the Dram-shop Law.—*Rickert v. The People.* Supreme Court of Illinois. 8 Chicago Leg. News, 347. Opinion by Scott, C. J. 1. An association or club called "Wheaton Co-partnership Company, Number One," organized for the purpose of allowing defendant to distribute intoxicating liquors to the members thereof, to be drunk upon the premises when distributed, was a shift or device to evade the law. 2. The appellant having no license to keep a dram-shop, whatever liquors were either given away or sold for tickets by him, under that arrangement, come within the definition of "unlawful selling." 3. It is preposterous to assume that a number of persons may with impunity associate themselves together as a firm or volutary company, purchase a quantity of liquors, and retail them out to the several members. Such an enterprise is unlawful, and all concerned would be guilty of violating the statute.

Contract—Illegal Consideration—Suppression of Criminal Prosecution.—*Kimborough v. Lane et al.* Court of Appeals of Kentucky. 15 Am. Law Reg. (N. S.) 389. Opinion by Cofer, J. 1. A contract having for its consideration an agreement to suppress a criminal prosecution is void. 2. It is equally so, if any part of the consideration was the suppression of the prosecution, and whether the contract was induced by promises or threats on one side or the other. 3. It is not necessary that the promise shonld be made at the same time as the contract; it is sufficient if it was made prior thereto, and was acted upon as a part of the consideration or inducement. 4. Nor does it make any difference that a prosecution is already commenced, and is in the hands and under the control of the commonwealth's officer, if the private prosecutor, as consideration for the contract, promises to abandon his own efforts in the course of justice. The particular interest of the party injured, in bringing the offender to justice, is one of the securities of the public in the enforcement of the laws, and any agreement by which this interest is turned against the commonwealth is void. To the report of this case the following note is added by the learned editor, the late Judge Redfield: "The foregoing opinion discusses a question of great practical importance, in regard to which we fear the law of this country is by no means up to the standard of the English common law, either in principle or administration. The rule in the English courts is very extensively discussed in Wells v. Abrahams, Law Rep. 7 Q. B. 554, in regard to the right of any civil remedy, and what remedy, the party aggrieved by a felonious act, which also involves an infraction of private right, may demand in a court of justice. It seems to have been intimated in some of the early English cases, that the civil remedy, or right of action, is merged in the felony. Higgins v. Butcher, Yelv. 89; Dawkes v. Coveneigh, Styles, 346; Buller, J., in Masters v. Miller, 4 Term Rep. 320–332; Crosby v. Long, 12 East, 409. In the latter case, it was held only to be suspended till the defendant was convicted or acquitted of the criminal charge without connivance. But later cases treats the civil right of action as merely suspended until the offender shall be convicted. Wellock v. Constantine, 2 Hurlst. & Colt. 146; Gimson v. Woodfall, 2 C. & P. 41; White v. Spettique, 13 M. & W. 603. And the rule does not apply to one who waived the right innocently. In the case of Wells v. Abrahams, *supra*, it is agreed by all the judges, that, although the felon can not plead his own crime either in bar or suspension of the civil remedy, as held in Luttrell v. Reynell, 1 Mod. 282, yet that if the felony appear either upon the declaration or evidence, it is competent in some proper mode to stay proceedings in the civil action, until the felon shall be convicted. Some of the cases go the length of holding that in such case it is the duty of the court to interfere *sua sponte* and stay the civil action. Gimson v. Woodfall, *supra;* Wellock v. Constantine, *supra*. But this doctrine has been repudiated. White v. Spettique, *supra;* Wells v. Abrahams, *supra*. But the latter case distinctly recognizes the rule of law that the civil remedy is suspended during the prosecution for felony, and can not be pressed until that has been terminated either by conviction or acquittal without plaintiff's connivance. Crosby v. Long, *supra*. But we are not aware that this rule has ever been enforced to any great extent, if at all, in this country. Metcalf's Note 2 to Higgins v. Butcher, Yelv. 89. But the rule of the common law, that all contracts for compounding or stifling prosecutions for felony are illegal and void, is maintained here to the fullest extent. The compounding of felony or stifling of prosecutions therefor is also indictable as a misdemeanor in most of the American states, either by special statute or by force of common law. It has often been intimated in English cases that this rule did not extend to mere misdemeanors, and that parties interested in such prosecutions might lawfully compound them. Elworthy v. Bird, 9 Moore, 230; 2 Bing. 258; Drage v. Ibbetsons, 2 Esp. 643; Ellenborough, Ch. J., in Taylor v. Lendey, 9 East, 49. But this rule is confined, we believe, to prosecutions for offences where the party aggrieved is principally concerned, and where the compromise is effected under the advice of the court, by virtue of the English statute, 18 Eliza. c. 5, s. 3. For in Collins v Blantern, 2 Wilson, 341, 1 Smith's L. C. 489, the question how far the contract for stifling or compounding a prosecution for perjury, which is only a misdemeanor in England, and securities given in furtherance of such compromise, may be enforced in the courts, was greatly discussed, and it was clearly held, that no action can be maintained upon any such contract where any part of the consideration arises from such compromise, thus making no distinction between felony and other offences of similar enormity. We have examined the facts upon which the court deny the validity of the contract in the principal case, and it seems to us the decision is based upon most satisfactory grounds; for the contract seems to have no other consideration but the compromise or abandonment of the prosecution against the defendant, and was expressly agreed to be surrenderred if the defendant were brought to trial. There would seem, then, to be no ground to argue that the contract did not rest exclusively upon the abandonment of the criminal prosecution, which, though not a felony, was an offence of the same public character, and of great moral turpitude."

Constitutional Law—Public Use—Imposition of Taxes—Railroad.—*Perry et al. v. City of Keene.* Supreme Court of New Hampshire. 15 Am. Law Reg. (N. S.) 399. Opinion by Ladd, J. 1. The laying of taxes is a legislative function, and the policy and expediency of it, as well as its amount, are questions exclusively for that department of the state. There is no abstract legal principle by which to determine whether a use is public; a court must decide it as a conclusion of fact and public policy, in the same manner as the legislature. Hence, while it is clearly the duty of a court to determine finally what is a public purpose, it will only decide adversely to the judgment of the legislature in a clear case. 2. If a purpose is public, it makes no difference that the agent by whom it is to be carried out is a private individual or corporation. 3. The building of a railroad is a public purpose; and a statute authorizing a town to vote money to aid in such purpose, even though the money is to be given as a *gratuity* and not as a subscription to stock, is not unconstitutional as a taking of private property for a private use.

Dower—What is a Sufficient Release.—*McLeery v. McLeery.* Supreme Court of Maine. 15 Am. Law Reg. (N. S.) 425. Opinion by Peters, J. A father died, leaving a widow. His homestead descended to his two sons. In consideration of their having the use and income of the whole estate, the sons, in writing, promised the widow an occupancy of a portion of the premises, and certain farm stock for her use, and a certain yearly payment. Afterwards, one son conveyed to the other. The latter then conveyed the entire premises to his mother by a warranty deed. Then he died, leaving a widow. In an action of dower by the widow of the son, against the widow of the father, it was *held*—1. That the agreement between the sons and the mother did not operate either as an assignment of dower to her or as a release of dower by her. 2. That the condition of the senior widow, as to her own dower, is the same, essentially, as if it had been specially assigned to her. 3. That her right of dower was not extinguished by merger in the fee conveyed to her by her son. 4. That she is not estopped by the covenants of warranty in such deed from availing herself of her right of dower in this action; inasmuch as such right was paramount to and independent of the title procured by the deed. 5. That there are two dowers in the estate; the senior widow having one-third of the whole, and the junior widow one-third of the remaining two-thirds, as dower; and that the junior widow is not now, nor will she be at the death of the senior widow, dowable in any greater proportion thereof.

Municipal Corporations—Power to Grant Monopolies.—*Logan et al. v. Pyne.* Supreme Court of Iowa. 10 Western Jurist, 425. Opinion by Beck, J. 1. The power exercised by municipal corporations must be confined within the limits prescribed by the statute creating them. They always are conferred by express grant, or necessarily implied as incidents to the powers expressly granted which are necessary to carry out the object and design for which such corporations are created. 2. Express grants of privileges, franchises, etc., can not be conferred by municipal corporations unless such right and power is given them under an express legislative grant. The creation of monopolies is againit public policy, and grants of such powers will not be inferred by the courts. 3. Where a charter declares that a city *shall* "exercise and enjoy all rights, immunities, powers and privileges" * * * "appertaining to a municipal corporation," and may "license, tax and regulate hackney carriages, omnibusses wagons, carts, drays and all other vehicles." *Held*, That no power is conferred by these provisions, in express words, to the municipal corporation of the city of Dubuque to grant the exclusive and sole right to run omnibuses etc., in the city of Dubuque. Citing Merriam v. Moody, 25 Iowa, 164; State v. Smith, 31 Iowa, 493; Ham v. Miller, 20 Iowa, 450 City of Burlington v. Keeler, 18 Iowa, 60; State of Conn. Gas Co., 18 Ohio St. 262; Mentram v. Lame, 23 How. 435, Charles Riv. Bridge v. Warren Bridge, 11 Pet. 420; Chicago v. Pumpff, 45 Ill. 90.

Nuisance—Original and New Damages.—*Powers v. City of Council Bluffs.* Supreme Court of Iowa. 10 Western Jurist, 428. Opinion by Adams, J. Wherever a nuisance is of such a character that its continuance is necessarily an injury, and when it is of a permanent character that will continue without change from any cause but human labor, there the damage is an *original* damage and may be *at once* fully compensated; and if the cause of the injury is permanent, the damages can be foreseen and estimated, and to reach the value of it, regard might be had to the reasonable cost of the remedy for the trouble. Successive actions are allowed only when the defendanant is continually in fault, whether of omission or commission, and each act produces *new* damages. *Held*, in the present case the damages were original.

Removal of Causes—Costs.—*Scupps v. Campbell, et al.*—United States District Court, Eastern District of Michigan. 4 Mich. Lawyer. Opinion by Brown, J. In suits commenced in the state court and removed to this court, the right to costs is not determined by R. S. sec. 968, but by the statute of the state. Where plaintiff, in an action of trespass on the case commenced in a state court and removed here, recovered less than one hundred dollars, defendants is entitled to costs under Compiled Laws, sec. 7290, as matter of right.

Legal News and Notes.

—Reports of Legal Decisions.—Lord Westbury, when Lord Chancellor of England once made the remark, "As soon as a report of any case is published, with the name of a barrister attached to it, the report is accredited, and may be cited as an authority before any tribunal."

—Chief Justice Monell, of the Superior Court of New York, died last week. He was born in 1815, in Hudson county, in the state of New York. Admitted to practice in 1836, he opened an office in his native town, but moved to New York in 1850, and subsequently became the head of a large firm, acquiring an extensive practice. In 1861, he was elected judge of the superior court; in 1867, he was re-elected for six years, and in 1873, re-elected for fourteen years, of which term he had eleven years still to serve. In 1873, he was also elected chief justice of the superior court.

—We beg to acknowledge the receipt of the May number of the *New Zealand Jurist* a monthly legal periodical published at Dunedin, New Zealand. It contains fifty-six pages, and embraces reports of cases decided by the supreme court in its different districts, and by the court of appeal. It likewise publishes notes of cases decided in other courts, and the statutes of the colony as they are enacted. It is very neatly printed, and the general get-up is good. It is edited by a barrister of the Middle Temple who has lately undertaken to conduct it, and who will do so, we have no doubt, with success. One thing about it surprises us, and that is the announcement on the first page. Price each part 7*s.* 6*d.* Subscription for the year £3.35*s.* New Zealand must be a good place for publishers.

—Law Schools.—The mills for the grinding out of candidates for distinction at the bar will soon again be in full blast. The Union College of Law, Chicago, Ill., has eight professors, twenty-three lecturers, and a large list of students. V. B. Denslow is the secretary of the college, and receives applications. The Law School of Harvard University is so well known as to need no praise. The examinations will begin September 28. John H. Arnold is the librarian, and will, upon application, furnish all necessary information. The St. Louis Law School will open its next annual term October 11. The full course is two terms of six months each, and the tuition, including daily use of the large and well-stocked library, is $50 per term. G. M. Stewart, No. 203 North Third street, St. Louis, is the dean, and will give personal attention to enquirers after information.

—Divorce in France.—Some interesting statistics are furnished by M. Eugene Chapus on the working of French law, which permits *separation de corps et de biens*, or, as we should say, divorce *a mensa et thoro*. From 1841 to 1850 there was an annual average of 1,529 petitions for judicial separation. In 1851, a law passed which afforded greater facilities of separation to ill-assorted couples, and the number of petitioners steadily increased, till, for the year 1869, they amounted to more than 3,000. It is calculated that out of 100 petitions, 88 are presented by women, cruelty on the part of the husband being the usual allegation. Again, one per cent. on the number of petitions are presented by persons who have been married less than twelve months; 28 per cent. by persons who have been married between one and five years. The largest proportion of petitions (37 per cent.) are for the dissolution of marriages which have lasted from ten to twenty years. Of the total number of petitions presented, about 78 per cent. are granted. In about one-third of the cases in which separation is sought, there have been no children by the marriage. It should be added that the number of separations by family agreement, without the intervention of the courts, is supposed to be double the number of legal separations—giving a result of about seven thousand separations yearly on 280,000 marriages. [*Pall Mall Gazette.*

—An Anecdote of President Lincoln.—Some years since, James F. Joy, before he became president of the Michigan Central Railroad Company, was the attorney of the road. While acting in this capacity, he found it necessary to employ a lawyer to defend a suit brought in one of the Illinois courts, against the company. As it turned out, the lawyer employed for this purpose was one Abraham Lincoln, of that state. Mr. Lincoln successfully defended his railroad client, and sent in a bill to Mr. Joy of $75 for his services. This bill Mr. Joy refused to pay, alleging that it was not customary for "country lawyers" to charge or receive such a fee for such services. Mr. Lincoln, however, nothing abashed by such a distinguished rebuke, brought suit for the bill against Mr. Joy, as attorney for the M. C. R. R., and obtained a verdict for the full amount of his bill. Time rolled on, and in 1861 this same "country lawyer" became President of the United States. A year or two afterward, a vacancy occurred on the bench of the Supreme Court of the United States, and Mr. Joy, among others, became a candidate for the presidential appointment. When the application was made to the President by Mr. Joy's friends, Lincoln "told a little story" about one Mr. Joy, attorney for the M. C. R. R., and a certain "country lawyer" in Illinois, and after telling it, declined to make the appointment. Naturally enough, Mr. Joy did not relish Mr. Lincoln's "little joke," and never afterwards spoke very favorably of Mr. Lincoln's personal or administrative qualities.—[*Ex.*

—Swearing.—A correspondent in the *New York Daily Register* writes as follows: Swearing is prohibited both by the common and ecclesiastical law. The earliest of statutes declares against it. Moses, book V. chap. 5: 11; and in a later work of authority, these positive words occur—"Swear not at all." St. Matthew, chap. 5: 33-37. By 13 Car. II, cap. 9, it is provided that all persons in the king's pay at sea shall be punished, by fine and imprisonment, for profane oaths, etc. And by 19 Geo. II, cap. 21, every day laborer, common soldier, sailor or seaman convicted of profane cursing or swearing shall forfeit one shilling, and every other person under the degree of a gentlemen, two shillings; and every other person of or above that degree, five shillings; and for the third, or more, treble; and if the party is unable to pay the fine, he shall be set in the stocks for the space of an hour for every single offence, and for every number of offences, two hours. Passing to our own time, we find that most of the states have passed similar statutes. In Connecticut, a law was passed as early as 1650, and remains, with slight modifications, on the statute book to this day. In New York, 1 R. S. 674, sec. 61, it is declared that—"Every person who shall profanely curse or swear shall forfeit one dollar for each offence." If the fine is not paid, the transgressor is introduced to the county jail. In New Jersey, Nixon Dig. 1014, sec. 8, a penalty of half a dollar is prescribed, and each offence stands by itself. You will see, therefore, that during the heated term, the latter state is the cheapest place to live in. The statute of Connecticut is rather broadly construed. You can not use the elegant expression "d—— old rascal," without incurring the law's vengeance. 18 Conn. 375.

—Law in Montenegro.—More interesting than any dealings with the foreigner is the code of laws which the prince, with the consent of the chiefs and elders, put forth for the internal government of the country. It must be remembered that he was the first lawgiver of a very primitive people, and that it was, perhaps, wise not to do too much in the way of putting new wine into old bottles. Thus, duelling is allowed, but it is forbidden, under a heavy fine, that any one besides the principals should join in the combat. It will not be forgotten that in England in the seventeenth century it was not unusual for the seconds, who were supposed to see fair play, to fight, as well as those whom they were to look after. In case of murder, it is forbidden for the kinsfolk of the murdered man either to accept any payment—our ancient *wergeld*—as a compensation for his blood, or to slay any of the kinsfolk of the murderer. One thinks of Waltheof slaying the sons of Carl because their father had slain his grandfather. All irregular action of any of these kinds is forbidden. The murderer is to be tried, and, if found guilty, shot. If he escapes from the country, his goods are to be confiscated, and, if he comes back, he wears a wolf's head. Then alone is anything like private violence allowed. Every Montenegrin may act as the executioner of the law on the man who has thus directly defied the law. The thief for the first two offences is to be punished by stripes, for the third by death. But if the theft takes the form of sacrilege, he is to be put to death for the first offence. A man who kills a burglar in the act, instead of punishment, receives a reward in money; but it is added that "great care must be taken not to kill an innocent person, as it must be answered for with one's life." So again, as in some cases of the jurisprudence of Rome and Athens, the convicted traitor, or he who conceals such a traitor, also carries the wolf's head, and may be slain by any man. Except in these specified cases, no one, even if sentenced by a competent judge, can be put to death without the warrant of the prince, who has the power of pardon. Till Prince Daniel's accession the administration of justice was corrupt, and the proceedings in the courts very disorderly. Montenegrins had been so in the habit of two speaking at once, crying out, screaming at and quarreling with each other, that no judge could possibly arrive at the rights of any matter. So it was ordered that a judge must listen to plaintiff and defendant, and must not permit both to speak at once, but each in his turn, without raising his voice to such a pitch as to hinder the judge from hearing calmly and distinctly what is said. If the judge does not understand the matter when once explained, let him demand it again, and if a judge make a point of always differing from his fellows, he must be removed. Among so warlike a people, cowardice in battle is naturally one of the greatest of crimes. The culprit is to stand in the open bazaar with an apron on, as being no better than a woman—a punishment which is said to be looked on as worse than death. Before Daniel's time, it is said to have been very hard to enforce such law as there was. A village would rise against the officers of justice who came to arrest a prisoner. By the code, any one who resists the police officer in such a case must be taken himself· he who hides a criminal or effects his escape must be punished as the criminal himself, and the officer of justice may lawfully kill any one who draws a weapon on him in the discharge of his duty. But the police are warned that if they take or kill an innocent person, they are responsible for the act. In cases of adultery, the husband may kill both the wife and the adulterer, if he finds them in the act. If they escape, they are banished. The ravisher is punished with banishment. The father of an illegitimate child must either bring it up or pay a heavy sum for its maintenance, and if he be a married man, he must further be imprisoned for six months on bread and water. All persons, of whatever nation or religion, are to be received in Montenegro, but while in the country, they must conform to its laws. On the other hand, any Montenegrin offending against the laws of a foreign country is liable to punishment in his own. Land is held in common by the family. There is no doubt that, through the vigorous administration both of the late and of the present prince, a wonderful reform has been wrought. Every one who has been there knows now that Montenegro is one of the safest countries in the world, one of those where the traveler has least to fear from brigandage or any other form of wrong. In such a country, one would almost have expected the armed assembly as a matter of course. In point of fact, the prince debates matters with *pregadi*, councillors summoned from each district. If he finds that they have lost the confidence of the neighbors, he dismisses them and chooses others.